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In The

Supreme Court of the United States

October Term, 1997

DAVID B., JAMES S., RICHARD D., CHRISTINE B. and GERMAINE M., through their Guardian Ad Litem, PATRICK T. MURPHY, on behalf of themselves and a class of individuals too numerous and transitory to mention,

Petitioners,

v.

JESS McDONALD, Director of the Illinois Department of Children and Family Services,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether, under *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), a federal district court is bound to accept a state official's mere understanding that a state law has changed, in determining whether there has been a "significant change in law" under *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992) to justify vacatur or modification of a consent decree based upon section 504 of the Rehabilitation Act of 1973.

(2) Whether the Seventh Circuit erred in rejecting the district court's finding, under *Rufo*, that there was no significant change in the law under section 504 of the Rehabilitation Act of 1973 to justify vacatur or modification of the consent decree.

(3) Whether the Seventh Circuit erred in directing the district court to determine now, more than fifteen years after the entry of the consent decree, whether there was a case or controversy under Article III of the United States Constitution when the consent decree was entered.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding in the United States Court of Appeals for the Seventh Circuit, which is the subject of this request for review:

DAVID B., JAMES S., RICHARD D., CHRISTINE B., and GERMAINE M., through their Guardian Ad Litem, PATRICK T. MURPHY, on behalf of themselves and a class of individuals too numerous and transitory to mention,

Plaintiffs-appellees below

JESS McDONALD, Director of the Illinois Department of Children and Family Services,

Defendant-appellant below, and

HOWARD A. PETERS, Secretary of the Illinois Department of Human Services,[1] and

JOSEPH A. SPAGNOLA, State Superintendent of Education for the Illinois State Board of Education,

Defendants-appellees below.

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[1] Howard A. Peters is the current Secretary of the Illinois Department of Human Resources, the successor to the Illinois Department of Mental Health and Developmental Disabilities. Rule 35.3 of the Rules of the Supreme Court of the United States automatically substitutes him for Ann Patla, who was the director of the latter department.

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PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, vacating an order of the United States District Court for the Northern District of Illinois, Eastern Division, that denied a motion by the Illinois Department of Children and Family Services (DCFS) to vacate or modify a 1981 consent decree, which requires DCFS and two other state agencies to provide rehabilitative services to severely disabled delinquent children.

The Seventh Circuit erroneously ruled as follows:

(1) *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), requires that a federal district court accept a state official's understanding of a new state law in determining whether there is a "significant change in law" under *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) to justify vacatur or modification of a consent decree based entirely on federal law.

(2) The district court's finding, under *Rufo*, that there was no significant change in the law under section 504 of the Rehabilitation Act of 1973 to justify vacatur or modification of the consent decree, was not a sufficient basis to deny a motion to vacate or modify the consent decree.

(3) Based solely on a remark in the preamble to the consent decree that "[t]he defendants have, unrelated to the course of this litigation, established a program to provide services to plaintiffs, which, plaintiffs have agreed, meets their needs," the Seventh Circuit ruled, *sua sponte*, that the district court must now determine whether the case was moot under Article III of the United States Constitution when the consent decree was entered in 1981.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit issued an opinion on June 16, 1997, vacating an order of the United States District Court for the Northern District of Illinois, Eastern Division, and remanding the case to the district court for further proceedings consistent with the opinion. The decision is reported as *David B. v. McDonald*, 116 F.3d 1146 (7th Cir. 1997), and is set forth in Appendix A. The memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, is reported as *David B. v. Patla*, 950 F. Supp. 841 (N.D. Ill. 1996), and is set forth in Appendix B. On August 5, 1997, the United States Court of Appeals for the Seventh Circuit entered an order denying the petitioners' petition for rehearing. The order is set forth in Appendix C. The petition for rehearing is set forth in Appendix D.

JURISDICTION

On June 16, 1997, the United States Court of Appeals for the Seventh Circuit issued its opinion vacating an order of the United States District Court for the Northern District of Illinois, Eastern Division, and remanding the case to the district court for further proceedings consistent with the opinion. Appendix A. On June 30, 1997, the plaintiffs filed a petition for rehearing. Appendix D. On August 5, 1997, the United States Court of Appeals for the Seventh Circuit denied the petition for rehearing. Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, COURT RULE, AND REGULATION INVOLVED

This case involves the following constitutional provisions, statutes, court rule, and regulation:

United States Constitution, Article III, section 2:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States. . . .

United States Constitution, Amendment XI:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state. . . .

Rehabilitation Act of 1973, section 504 (29 U.S.C. § 794(a)):

No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . . .

Rehabilitation Act Amendments of 1986, section 1003(a)(1) (42 U.S.C. § 2000d-7(a)(1)):

A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973. . . .

Federal Rules of Civil Procedure, Rule 60(b)(5):

On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application. . . .

45 C.F.R § 84.4(b)(1)(iv):

[A recipient of federal financial assistance may not p]rovide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others.

Children and Family Services Act, section 5(l) (20 ILCS § 505/5(l)):

A minor . . . adjudicated delinquent shall not be placed in the custody of or committed to [the Illinois Department of Children and Family Servi[illegible] by any court. . . .

Juvenile Court Act of 1987, section 1-3(9) (705 ILCS 405/1-3(9)):

"Legal custody" means the relationship created by an order of court in the best interests of the minor which imposes on the custodian the responsibility of physical possession of a minor and the duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care. . . .

Juvenile Court Act of 1987, section 2-27(2) (705 ILCS 405/2-27(2)):

When a minor is placed with a suitable relative or other person . . . , the court shall appoint him the legal custodian or guardian of the person of the minor. When a minor is committed to any agency, the court shall appoint the proper officer or representative thereof as legal custodian or guardian of the person of the minor. Legal custodians and guardians of the person of the minor have the respective rights and duties set forth in subsection (9) of Section 1-3 except as otherwise provided by order of court. . . .

Juvenile Court Act of 1987, section 5-29(3) (705 ILCS 405/5-29(3)):

When a minor is placed with a suitable relative or other person, the court shall appoint him the legal custodian or guardian of the person of the minor. When a minor is committed to any agency, the court shall appoint the proper officer or representative thereof as legal custodian or guardian of the person of the minor. Legal custodians and guardians of the person of the minor have the respective rights and duties set forth in subsection (9) of Section 1-3 except as otherwise provided by order of court. . . .

STATEMENT OF THE CASE

The petitioners seek review of a judgment of the United States Court of Appeals for the Seventh Circuit ruling that the United States District Court for the Northern District of Illinois erred in denying a motion by DCFS to vacate or modify a 1981 consent decree based on section 504 of the Rehabilitation Act of 1973.

The Seventh Circuit ruled in the present case that the district court erred when it interpreted an amendment to an Illinois statute as not changing state law sufficiently to justify modification or vacatur of the consent decree. The Seventh Circuit ruled that, under *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), the district court had no choice but to accept DCFS's "understanding" of the state law, even though the district court's careful analysis of the law had demonstrated that DCFS's understanding was clearly erroneous. 116 F.3d at 1149.

The Seventh Circuit also ruled that, on remand, the district court must determine whether a "substantial federal claim," which the Seventh Circuit has chosen not to define, supports the consent decree. Directly challenging the authority of this Court's precedents, the Seventh Circuit ruled that the district court's finding, under *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992), that there was no significant change in the law since 1981 to justify vacatur or modification of the consent decree, was not a sufficient basis to deny DCFS's motion. 116 F.3d at 1149-50.

The Seventh Circuit further ruled that the district court must now determine whether the case was moot under Article III of the United States Constitution when the court entered the consent decree in 1981. The Seventh Circuit based its ruling solely on a remark in the preamble to the decree that "[t]he defendants have, unrelated to the course of this litigation, established a program to provide services to plaintiffs, which, plaintiffs have agreed, meets their needs." *Id.* at 1148. Prior to the Seventh Circuit's decision, none of the parties to this

litigation had ever raised or argued any issue involving Article III mootness.

STATEMENT OF FACTS

A. Background

On April 25, 1979, the plaintiffs filed the present lawsuit in the United States District Court for the Northern District of Illinois, Eastern Division, because various state agencies mandated to serve children were refusing to provide essential services to a class of children with physical, emotional, and/or mental disabilities who had become involved in delinquent behavior. Second Amended Complaint ¶ 3.[2] The court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

None of the three state agencies named as defendants – DCFS, the Department of Mental Health and Developmental Disabilities (DMHDD), or the Illinois State Board of Education (SBE) – was willing to assume responsibility for these children with multiple disabilities. All of the defendant agencies took the position that the children were either too disabled or not disabled enough to receive public services or public funds for private care. *Id.* ¶¶ 5-13, 23-26.

DCFS took the position that, although most of the children were neglected and abused, and none of them could reside at home, they were not so abused and neglected as to require DCFS assistance. In many cases, in fact, the children were so disturbed that their parents were unable to take care of them and refused to pick them up from psychiatric hospitals or the juvenile detention center when they were due to be released. *Id.* ¶¶ 5-13, 29-30.

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[2] The plaintiffs filed their second amended complaint, which is the relevant pleading for the purposes of this appeal, on March 1, 1980. The second amended complaint appears in Appendix E.

DMHDD took the position that, although these children suffered serious mental disorders, they did not require long-term mental health hospitalization and were therefore not its problem. SBE took the position that, although the children had special educational needs, they required residential placement and were therefore the responsibility of DCFS or DMHDD. *Id.* ¶¶ 10-13.

In all cases, there was a consensus that the children desperately needed access to the services provided by the three state agencies and would normally be entitled to assistance. The only issue that held up placement of these children was funding. While the three state agencies bickered among themselves about who was responsible for paying for these essential services, the children "fell through the placement cracks" in the state's service system. Their lives were held in limbo pending placement, and they were often forced to endure long and unnecessary stays in the juvenile detention center. *Id.* ¶¶ 10-13, 23-30.

Because of their emotional disorders, many of the children had committed what could be called delinquent acts. However, in almost all cases, the offenses were such that the Cook County State's Attorney did not wish to prosecute the delinquency petitions and certainly did not want the juvenile court to commit the children to the Illinois Department of Corrections (DOC). Since, however, the three defendant departments refused to serve the children and their parents could not take care of them, DOC loomed as the only viable alternative – other than the streets. *Id.* ¶¶ 11-22.

The plaintiffs alleged that the defendants denied the plaintiffs necessary services because of their disabilities, contrary to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794(a)) and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* ¶¶ 32, 34-35. On September 4, 1980, Judge John Powers Crowley denied the defendants' motion to dismiss the second amended complaint in an unpublished opinion. *David B.*

v. deVito, No. 79 C 1662, slip op. (N.D. Ill. Sept. 4, 1980).[3] On October 2, 1981, following negotiations by the parties, Judge Marvin E. Aspen approved the consent decree, fully resolving plaintiffs' claims against the defendants.[4]

B. The Consent Decree

The provisions of the consent decree apply to a class of Cook County children who are involved with the juvenile court and require specialized services. Consent Decree ¶ 1. The decree seeks to ensure that these needy children no longer "fall through the cracks"; to require cooperation rather than infighting among DCFS, DMHDD and SBE; and to achieve the goal of providing services to these children. Accordingly, the decree sets forth a specific mechanism "to resolve any and all difficulties experienced in providing services to the above defined class members." *Id.* ¶ 2.

The consent decree does not direct that any specific department provide services for the children. It merely states that each of the three defendants will participate in the Governor's Youth Services Initiative (GYSI), that GYSI will develop a service plan for each child that it accepts, and that the GYSI administrator will ensure that the plan is fully implemented. A child referred to GYSI does not become a ward of DCFS or of GYSI. None of the defendant agencies takes custody of the child. Instead, the three departments guarantee treatment when they determine that the child needs treatment. *Id.*

The consent decree gives the departments and their appointed experts the flexibility to decide what services are necessary for the referred children. It also allows the experts to decide how to apportion among the agencies the costs of the services. The defendants' representatives

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[3] Judge Crowley's opinion appears in Appendix F.

[4] The consent decree appears in Appendix G.

in GYSI could decide that any one of them, or all of them, would fund the needed services. *Id.*

Apparently, the departments decided early on that DCFS would be the provider of the services, but they could have decided that another department, or all three departments, would take on that responsibility. They still can make such a decision.

C. GYSI 1981-1995

Over the years the agreement has worked well. Nicolai Dec. ¶ 14.[5] Juvenile court personnel, including judges, probation officers and GYSI representatives, have worked cooperatively and successfully to implement the consent decree and to ensure that children with multiple disabilities receive the treatment they need. *Id.* Until DCFS filed its motion to vacate or modify the decree, none of the parties found it necessary to call upon the district court for guidance or enforcement.

The GYSI process begins when the juvenile court refers a child to GYSI. In each case, a judge has determined, after hearing evidence as to the allegations in the delinquency petition and as to the child's background and needs, that it would not be appropriate to commit the child to DOC. Virtually every child referred to GYSI exhibits serious emotional or mental problems and is in need of special educational programs. *Id.* ¶¶ 3-4.

The delinquency charges filed against the GYSI children range from nonviolent acts, such as gambling, shoplifting, and possession of alcohol, to domestic violence to violent crimes. In only two cases, however, has a child been charged with first degree murder. *Id.* ¶ 9.

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[5] "Nicolai Dec." refers to the initial declaration of Sheila Nicolai attached to the plaintiffs' memorandum filed in the district court on May 3, 1996. Nicolai is the deputy chief probation officer for the Circuit Court of Cook County, Juvenile Justice Division. *Id.* ¶ 1. The declaration appears in Appendix H.

GYSI determines that virtually all of the children require residential placements that provide treatment and care. The representative from DCFS has always concurred in the need for placement and in the selection of the placement. *Id.* ¶ 7. If GYSI did not place these children, the juvenile court would have no alternative but to commit most of them to DOC, where they would not receive services to deal with their emotional and mental problems, and their mental health would likely deteriorate. *Id.* ¶ 12.

D. GYSI Since July 1995

On July 5, 1995, DCFS, citing a new Illinois law, P.A. 89-21 (89-21), announced to the juvenile court that it would no longer provide any services to the multi-disabled children referred to GYSI or honor its commitments under the consent decree. *Id.* ¶ 15. DCFS's decision to abandon the consent decree was unilateral. DMHDD and SBE took no formal position regarding the continued viability of the consent decree.

DCFS's decision to abandon the consent decree led to increasingly bitter confrontations with the juvenile court. From the court's perspective, the consent decree was still in full force and effect. Absent guidance from the federal court, the court insisted that DCFS honor its obligations to the plaintiffs, and it therefore continued to refer children to GYSI. *Id.* ¶¶ 16-19.

Since DCFS's July 1995 announcement, a number of multi-disabled children, whom GYSI has determined to be in need of essential services, have been forced to endure long and unnecessary stays in the juvenile detention center and DOC while the defendant agencies have once again fallen to unseemly and inane bickering over which of them is responsible for funding the placements. *Id.*

E. DCFS's Motion to Vacate or Modify the Consent Decree

On March 5, 1996, eight months after its announcement, DCFS finally filed a motion to vacate or modify the consent decree. On September 27, 1996, after extensive briefing, Chief Judge Aspen denied the motion. *David B. v. Patla*, 950 F. Supp. 841, 842, 851 (N.D. Ill. 1996).

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT ERRED IN RULING THAT A STATE OFFICIAL'S "UNDERSTANDING" (OR, IN THIS CASE, MISUNDERSTANDING) THAT A STATE LAW HAS CHANGED IS SUFFICIENT TO JUSTIFY VACATUR OR MODIFICATION OF A CONSENT DECREE BASED ENTIRELY ON FEDERAL LAW.

The Seventh Circuit directed the district court, on remand, to "either construe or modify the [consent] decree forthwith to permit Illinois to reallocate tasks among its agencies and to reduce the services offered to persons adjudicated delinquent." *David B. v. McDonald*, 116 F.3d 1146, 1150 (7th Cir. 1997). The Seventh Circuit based this direction on what appears, early in its decision, to be its assumption that a 1995 amendment of section 5(l) of the Children and Family Services Act (20 ILCS 505/5(l)), included in Public Act 89-21(89-21), curtails "DCFS's authority to provide services to children over the age of 13 who have been adjudicated 'delinquent.' " *Id.* at 1147. The decision thus concludes, without any analysis, that as a result of 89-21, "certain youths now are excluded from certain services provided by the DCFS, not by reason of disability (as might have been

true before 1981) but by reason of criminal conviction."[6] *Id.* at 1149.

The Seventh Circuit ignored the plaintiffs' argument that 89-21 does not prohibit DCFS from prov ing *services to*, as opposed to *taking custody of*, children 13 to 17 who have been adjudicated delinquent, and therefore does not conflict with any provision in the consent decree. Even more troubling, the Seventh Circuit paid no attention to the district court's painstaking analysis of 89-21 and its conclusion that "Illinois law does not preclude the plaintiffs from receiving DCFS services based on their delinquency." *David B. v. Patla*, 950 F. Supp. 841, 849-51 (N.D. Ill. 1996). The decision instead accuses the district court of taking an "approach redolent of the losing side's contentions" in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), and thinking that "only a change in *federal* substantive law matters." 116 F.3d at 1149 (emphasis in original). To the contrary, the district court obviously thought that a change in state law could be "the substantial change in law needed to justify modification or vacature of the Consent Decree." 950 F. Supp. at 851. It found, however, that no such change had occurred. *Id.*

The Seventh Circuit explained why it believed it was unnecessary to consider whether 89-21 does in fact conflict with the consent decree. The court held that *Rufo* does not require an *actual* change in state law. Instead, taking *Rufo* and its progeny well beyond where they have ever gone before, the Seventh Circuit ruled that a state official's *mere understanding*, no matter how erroneous, that a state law has changed will do:

> Plaintiffs . . . disagree with the DCFS's reading of its options under state law. Response requires nothing more than a citation to *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89

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[6] The amendment deals with children "adjudicated delinquent" in the juvenile court, *not* those convicted in a criminal court.

(1984): given the Eleventh Amendment, *a federal court may not use disagreement with a state official's understanding of state law as the basis of relief.*

116 F.3d at 1149 (emphasis supplied).

The Seventh Circuit thus turned *Pennhurst* upside down, or inside out, to reach the astonishing and radical conclusion that, under *Rufo*, a state official's mere understanding of state law, regardless of what the law actually says, can require a federal court to vacate or modify a consent decree. The Seventh Circuit's reliance upon *Pennhurst* in the present case is grossly misplaced. In *Pennhurst*, the class plaintiffs asked a federal court to enforce state law by issuing an injunction against a state official based on that state law. 465 U.S. at 103-123. In the present case, the class plaintiffs asked a federal court to enforce *federal* law, *not* state law. The state law in question came into the case only because one defendant, DCFS, alleged that the law, 89-21, no longer allows it to do what it agreed to do in the consent decree – provide services to the class plaintiffs.

In any event, *Pennhurst*, which relies, as the decision notes, on the Eleventh Amendment, cannot apply to the consent decree here, which is based upon section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794(a)). Congress has seen fit to abrogate state immunity under the Eleventh Amendment in suits in federal court for violations of section 504. *See* section 1003(a)(1) of the Rehabilitation Act Amendments of 1986 (42 U.S.C. § 2000d-7(a)(1)).

If the Seventh Circuit's recasting of *Rufo* and *Pennhurst* becomes the law of the land, few institutional reform consent decrees will remain standing – not if a state official's mere understanding of state law is all it takes to require a federal court to modify or vacate such a decree. In *Rufo*, this Court clearly contemplated an *actual* change in law, not merely a state official's understanding that a state law has changed.

Rufo surely also anticipated that the federal court would make the decision that the law had changed and not merely assume, as the Seventh Circuit did, that the state official's understanding is correct. Indeed, Article III of the United States Constitution requires the court, *not* a state official, to make that decision. A federal court must reserve to itself "full authority . . . to deal with matters of law." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982). Accordingly, "full authority" to decide whether state law has changed sufficiently to relieve state officials of their obligations *under federal law* must be vested in the district court and cannot be abdicated to a state official. In the present case, "full authority" to decide whether 89-21 changed Illinois law must, consistent with Article III, be vested in the district court, *not* DCFS.

The Seventh Circuit refused to deal with the district court's interpretation of 89-21 because the validity of that interpretation is plain to see. In 89-21, the Illinois legislature inserted the following proviso in section 5(l) of the Children and Family Services Act (emphasis supplied): "A minor . . . adjudicated delinquent *shall not be placed in the custody of or committed to* [DCFS] by any court. . . . " The legislature has defined "legal custody" in section 1-3(9), of the Juvenile Court Act of 1987 (705 ILCS 405/1-3(9)) (emphasis supplied):

> "Legal custody" means the *relationship created by an order of court* in the best interests of the minor which imposes on the custodian the *responsibility of physical possession of a minor* and the *duty to protect, train and discipline him* and to provide him with food, shelter, education and ordinary medical care.

Section 1-3(9) makes it clear that "legal custody" entails far more than the provision of services to a child. It sets forth, in the conjunctive, three additional requirements: (1) A court must create the relationship in an order. (2)

The order must impose upon the custodian the "responsibility of physical possession" of the child. (3) The order must also impose upon the custodian the "duty to protect, train and discipline" the child.

The use of the word "commit" in the Juvenile Court Act of 1987 shows that the legislature intended to require the same three circumstances: a court order creating the relationship, a court-imposed "responsibility of physical possession," and a court-imposed "duty to protect, train and discipline." Section 2-27(2) of the Act (705 ILCS 405/2-27(2)), in the case of abused, neglected or dependent children, and section 5-29(3) (705 ILCS 405/5-29(3)), in the case of delinquent children, provide that the juvenile court may "place" them with or "commit" them to relatives, other persons and various agencies. These sections also make it clear that the individuals and agencies to whom the children are committed, or with whom they are placed, have a court-ordered "responsibility of physical possession" of them and a court-ordered "duty to protect, train and discipline" them. Both sections 2-27(2) and 5-29(3) provide (emphasis supplied):

> When a minor is *placed* with a suitable relative or other person . . . , the court shall appoint him the *legal custodian or guardian of the person of the minor*. When a minor is *committed* to any agency, the court shall appoint the proper officer or representative thereof as *legal custodian or guardian of the person of the minor*. Legal custodians and guardians of the person of the minor have *the respective rights and duties set forth in subsection (9) of Section 1-3* except as otherwise provided by order of court. . . .

When the juvenile court refers children to the Governor's Youth Services Initiative (GYSI) under the consent decree, it does not place them in the custody of DCFS or commit them to DCFS at any step along the way. The district court meticulously described the GYSI process in its decision and concluded that under the consent decree

DCFS only funds services for delinquent children. 950 F. Supp. at 849-50. The court further concluded as follows:

> At bottom, DCFS asks this court to interpret the amendments contained in P.A. 89-21 to say that the agency cannot be made to pay for any services for abused and neglected children who have been charged with a crime or deemed delinquent. However, given that the Illinois legislature could easily have included such language in DCFS's enabling statute, but instead chose only to restrict the ability of the Juvenile Court to "commit" delinquents to DCFS or place them in the agency's "custody," DCFS's interpretation cannot be accepted. . . . Illinois law does not preclude the plaintiffs from receiving DCFS services based on their delinquency. . . .

Id. at 851.

The Seventh Circuit plainly erred. *Rufo* does not require a federal court to modify or vacate a consent decree based upon a state official's clearly erroneous and self-serving interpretation of a state law.

II. THE SEVENTH CIRCUIT ERRED IN RULING THAT THE DISTRICT COURT'S FINDING THAT THERE WAS NO SIGNIFICANT CHANGE IN THE LAW SINCE THE ENTRY OF THE CONSENT DECREE WAS NOT A SUFFICIENT BASIS TO DENY A MOTION TO VACATE OR MODIFY THE CONSENT DECREE.

The Seventh Circuit also instructed the district court to determine, on remand, whether a substantial federal claim supports the October 2, 1981 consent decree. 116 F.3d at 1150. The Seventh Circuit based its request upon its statement that "it takes more than the consent of public officials to support a federal court's entry and enforcement of an injunction; it takes a substantial claim based on federal law." *Id.* This is so, the Seventh Circuit

ruled, whether or not a "significant" change in the law has occurred under *Rufo*. *Id.* at 1149.

But in *Rufo*, in holding that Rule 60(b)(5) of the Federal Rules of Civil Procedure applies to consent decrees, this Court ruled that a party seeking to modify an institutional reform decree must establish "either a significant change in factual conditions or in law." 502 U.S. at 378, 384. This Court also emphasized that a district court may not modify such a decree simply because a party now finds it inconvenient to live with it:

> Although we hold that a district court should exercise flexibility in considering requests for modification of an institutional reform consent decree, it does not follow that a modification will be warranted in all circumstances. Rule 60(b)(5) provides that a party may obtain relief from a court order when "it is no longer equitable that the judgment should have prospective application," not when it is no longer convenient to live with the terms of a consent decree. Accordingly, a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree.

Id. at 383. This Court ruled that a district court may modify a consent decree "when the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Id.* at 388. This Court stressed, however, that a change in the law does not, by itself, justify modification of a consent decree:

> [W]e have no doubt that, to "save themselves the time, expense, and inevitable risk of litigation," [citation omitted], petitioners could settle the dispute . . . by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also

> more than what a court would have ordered absent the settlement. . . .
>
> To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation.

Id. at 389.

In the present case, however, the Seventh Circuit, insisting upon the validity of the plurality opinion of that court sitting *en banc* in *Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993), ruled that a district court must modify or vacate a consent decree even where there is no significant change in the law or the facts. This should be done, the court stated, where a claim is weak to begin with because "then adjustments in state and federal law that weaken its claims cannot be a 'significant' change in the law." 116 F.3d at 1149. To protect state governments from being "bound forever" because they could not demonstrate a significant change in law, the Seventh Circuit substituted its own "substantial claim" test for this Court's *Rufo* test. *Id.* at 1149-50.

The Seventh Circuit, however, provided no guidance as to what, in this context, "substantial federal claim" is supposed to mean.[7] Assuming, however, that a requirement of a "substantial federal claim" is consistent with

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[7] This Court has defined the phrase "substantial federal question" in the context of determining whether a federal court has jurisdiction to hear a claim under section 1331 of the Judicial Code (28 U.S.C. § 1331). A "substantial federal question" is lacking only when the right claimed under the Constitution or federal statutes is clearly "immaterial and made solely for the purpose of obtaining jurisdiction" or when it is "wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682-83 (1946). This Court has more recently ruled that there is no "substantial federal question" only if the right claimed is "so

Rufo and Rule 60(b)(5), the Seventh Circuit's application of such a rule in this case is clearly not. The district court's findings and rulings on this issue were entirely correct under any "substantial federal claim" test consistent with *Rufo*. The only possible error on the part of the district court was its omission of the magic words "substantial federal claim" from its opinion, but that certainly does not justify the Seventh Circuit's decision to vacate the district court's order and remand the case.

The district court ruled that DCFS "has not carried its burden of showing a significant change in the law on this point to justify modification or vacatur." 950 F. Supp. at 848. In so ruling, the court necessarily determined that a substantial federal claim supported the consent decree. One year before the entry of the consent decree, the court (Judge John Powers Crowley then sitting) denied the defendants' motion to dismiss the second amended complaint, ruling in favor of the plaintiffs on this specific issue. *See David B. v. deVito*, No. 79 C 1662, slip op. (N.D. Ill. Sept. 4, 1980) (set forth in Appendix F). There was thus a substantial federal claim both when the court entered the consent decree and when it ruled on DCFS's 1996 motion to vacate or modify the decree, *and* there was no significant change in the law during that time.

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insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-67 (1974). *See also Hagans v. Lavine*, 415 U.S. 528, 542-43 (1974); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70-71 (1978). If this is what the Seventh Circuit means when it uses the phrase "substantial federal claim," it clearly had no basis for vacating the district court's order and ordering it to determine whether a substantial federal claim supports the consent decree.

The district court's ruling was correct under *Rufo* as well as the Seventh Circuit's decision in *Evans*. In its opinion and order denying DCFS's motion to vacate or modify the consent decree, the court made the following determination:

> [T]he plaintiffs allege they have been discriminated against because of the severity of their disabilities, and . . . DCFS has not demonstrated this sort of a claim to clearly fall outside the purview of Section 504. The cases and regulations supporting the plaintiffs' claim that they were discriminated against "solely by reason" of their disability have not been overruled, . . . and it is far from conclusive that the law is to the contrary.

950 F. Supp. at 848. This finding, as well as the court's related analysis in its opinion and order, were entirely consistent with a determination that a substantial federal claim supports the consent decree.

The district court concisely and accurately stated the plaintiffs' claim under section 504 (citing their second amended complaint) as follows:

> The Complaint alleges that the plaintiffs' disabilities caused them to commit delinquent and criminal acts. . . . In most cases, however, the State's Attorney's Office did not consider the offenses serious enough, or the children culpable enough, to prosecute the delinquency petitions or seek commitment of the children to the Illinois Department of Corrections ("DOC"). Comp. ¶ 11. While children in this situation would usually be released to the custody of their parents or guardians, the children in the plaintiff class demonstrated such severe mental and emotional disabilities that their families were unable to adequately treat and care for them. *Id.* ¶¶ 10, 13.

> [T]he plaintiffs alleged that the defendants – the heads of DCFS, the Illinois Department of Mental Health and Developmental Disabilities ("DMHDD"), and the State Board of Education ("SBE") – refused to provide them with necessary services and treatment because of their disabilities. All of the defendant agencies took the position that the children were either too disabled or not disabled enough to receive public services or public funds for private care. Thus, despite the fact that these children had mental and emotional disabilities, DMHDD decided that they were not entitled to treatment from DMHDD because they did not require extended hospitalization. Complaint ¶ 12. DCFS conceded that many of these individuals were neglected and abused, and thus would normally be entitled to assistance, but the agency maintained that the plaintiffs were not entitled to DCFS services because either they were not so abused as to require placement outside the family, or they were too disruptive to be placed with other DCFS children. *Id.* ¶¶ 13, 29-30. SBE acknowledged that these children had special educational needs, but considered them the problem of DMHDD and DCFS because they required placement in residential treatment programs. As a result, these children "fell between the placement cracks," and were left to fend for themselves at the DOC or on the streets. *Id.* ¶¶ 11-23.

950 F. Supp. at 843.[8]

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[8] Some of the language in the Seventh Circuit's decision misrepresents what the consent decree does and does not require DCFS and the other state agencies to do through GYSI. The decision most egregiously states that the decree requires GYSI "to render special services to criminals." 116 F.3d at 1147. To the contrary, the decree does not require GYSI to render

Rejecting DCFS's argument that *Traynor v. Turnage*, 485 U.S. 535 (1988), rendered the plaintiffs' claim under section 504 insubstantial, the district court correctly stated that "*Traynor* does not directly bear on the issue presented in the instant case, since the actual question in *Traynor* was whether Congress had created an exception to the scope of Section 504. . . . " 950 F. Supp. at 847. The district court further noted that a Department of Health and Human Services regulation interpreting the Rehabilitation Act directly contradicts the rule of law that DCFS would extrapolate from *Traynor*. *Id.* at 848. The regulation states that a recipient of federal financial assistance may not

> [p]rovide different or separate aid, benefits, or services to handicapped persons *or to any class of handicapped persons* unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others.

45 C.F.R. § 84.4(b)(1)(iv) (emphasis supplied). The district court closed the circle around DCFS's *Traynor* argument as follows: "Indeed, Judge Crowley relied upon this same

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services to *criminals* or to render *special services* to anybody. The consent decree defines the plaintiffs as "actual *or potential* wards of the Juvenile Court of Cook County who suffer from emotional, physical or mental disabilities." Consent Decree at Preamble (emphasis supplied). The decree does not require that they be adjudicated delinquent, let alone convicted of a crime. They need only be "referred to Juvenile Court" and "*alleged* to have engaged in conduct or [have] *parents [who] are alleged* to have engaged in conduct in violation of the Illinois Juvenile Court Act. . . . " Consent Decree at ¶ 1B and C (emphasis supplied). The Seventh Circuit did not mention the district court's pertinent finding that "[i]n most cases, . . . the State's Attorney's Office *did not consider the offense serious enough, or the children culpable enough*, to prosecute the delinquency petitions or seek commitment of the children to the Illinois Department of Corrections." 950 F. Supp. at 843 (emphasis supplied).

HHS regulation when he rejected a similar argument raised by DCFS in 1980, and neither HHS nor Congress has seen fit to alter the language of this provision since that time." 950 F. Supp. at 848.

The district court extended its analysis by noting that, in the 16 years since Judge Crowley's opinion, a respectable line of authority, holding that discrimination on the basis of the severity of disability can violate section 504, has evolved and continues to support the plaintiffs' claim, citing *Wagner v. Fair Acres Geriatric Center*, 49 F.3d 1002, 1016 n.15 (3d Cir. 1995). The district court also noted that several federal courts "have concluded that the severity of one's disability can itself be disability, and that the denial of services based on the severity of a handicap would contravene Section 504." 950 F. Supp. at 848.

Much more than just the by-gone consent of public officials supports the consent decree. The district court's findings and analysis yielded the ineluctable conclusion that a substantial federal claim under section 504 of the Rehabilitation Act existed at the time of the entry of the consent decree and still exists today. In vacating the district court's order, the Seventh Circuit completely ignored Chief Judge Marvin E. Aspen's thorough and well reasoned analysis of federal law. Moreover, the Seventh Circuit's decision disrespects this Court's ruling in *Rufo* that only a *significant* change in the law justifies vacating or modifying such a decree.

III. THE SEVENTH CIRCUIT ERRED IN RULING, *SUA SPONTE*, THAT THE DISTRICT COURT MUST NOW DETERMINE WHETHER THE CASE WAS MOOT UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION WHEN THE COURT ENTERED THE CONSENT DECREE IN 1981.

In addition to rebuking the district court for attempting to interpret state law, and ignoring its careful analysis

of whether there were significant changes in state or federal law, the Seventh Circuit added further insult to injury by directing the district court to "determine whether a case or controversy existed when the decree was entered." 116 F.3d at 1150. The court based this instruction on the fifth paragraph in the preamble to the consent decree: "The defendants have, unrelated to the course of this litigation, established a program to provide services to plaintiffs, which, plaintiffs have agreed, meets their needs." The Seventh Circuit stated that the paragraph "implies that, at the time the decree was entered, the parties were not adverse, and that the district court therefore lacked the case or controversy essential to federal jurisdiction." *Id.* at 1148.

None of the defendants has ever raised this issue in the long course of this litigation in either the district court or the Seventh Circuit. The latter court gave the plaintiffs no opportunity to brief the question (except in their petition for rehearing), and the panel hearing the oral argument never mentioned it.

The Seventh Circuit acknowledged, citing *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 n.14 (1986), and *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), that "[w]hen a suit sets in motion a change of policy, a prospective judgment may be apt . . . ; the decree prevents the defendants from reverting to their old ways as soon as the case ends." 116 F.3d at 1148. The court went on to state, however, with no citation or justification whatsoever: "But a new policy unrelated to the litigation implies that the suit was unnecessary, and that the controversy is moot." *Id.*

The decisions of this Court have an altogether different flavor. In *W.T. Grant*, this Court stated the voluntary cessation rule as follows:

> [V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i. e.*, does not make the case moot. . . . A controversy may remain to

> be settled in such circumstances . . . *e.g.*, a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.
>
> The case may nevertheless be moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated." The burden is a heavy one.

345 U.S. at 632-33 (citations omitted).

In *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968), this Court stated:

> The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave "[t]he defendant free to return to his old ways." [Citations omitted.] A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

393 U.S. at 203.

Although *W.T. Grant* and *Concentrated Phosphate* were antitrust cases, this court has applied the voluntary cessation rule in suits against public officials. In *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), this Court stated that "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." 455 U.S. at 289-90.

In *County of Los Angeles v. Davis*, 440 U.S. 625 (1979), this Court cited *W.T. Grant* in reiterating that the "burden

of demonstrating mootness 'is a heavy one.' " 440 U.S. at 631. This Court also stated the voluntary cessation rule as follows:

> [J]urisidiction, properly acquired, may abate if the case becomes moot because (1) it can be said with assurance that "there is no reasonable expectation . . . " that the alleged violation will recur [citations omitted] and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. [Citations omitted.]
>
> When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.

Id.

This Court has been careful to distinguish the Article III mootness issue from the issue of a claimant's right to injunctive relief in a voluntary cessation case. In *W.T. Grant*, this Court held that the case was not moot, but it also ruled that the trial court had not abused its discretion in refusing to award injunctive relief. Insofar as injunctive relief is concerned, "the moving party must satisfy the court that relief is needed." 345 U.S. at 633. The relief burden, however, is not an Article III issue.[9] In

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[9] In *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982), the court explained the difference as follows: "[*W.T. Grant*] held that the burden is upon the *defendant* to show that a claim for injunctive relief has become moot in the Article III sense. But that opinion belies the conclusion that mootness was its sole concern; the Court was concerned with the requirements of equity as well as with those of the Constitution. It drew the distinction explicitly: 'Along with its power to *hear the case*, the court's power to *grant injunctive relief* survives discontinuance of the illegal conduct. . . . But the moving party must satisfy the court that

City of Mesquite, this Court stated that voluntary cessation of an illegal practice "is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power." 455 U.S. at 290.

This Court's binding decisions emphasize that a defendant such as DCFS has a "stringent" and "heavy" burden to demonstrate that "there is no reasonable expectation that the wrong will be repeated." In light of this Court's repeated statements of this onerous requirement, the Seventh Circuit's decision to seize on the perhaps unfortunate word "unrelated" in the preamble to the consent decree to question the validity of the 1981 decree under Article III is simply unwarranted.

The Seventh Circuit's statement that "a new policy unrelated to the litigation implies that the suit was unnecessary" (116 F.3d at 1148) misleadingly implies that the plaintiffs filed their suit after DCFS and the other defendants put their new policy in effect. The facts are to the contrary and additionally explain why the drafters of the consent decree stated, unwisely perhaps, that "[t]he defendants have, unrelated to the course of *this* litigation, established a program. . . . " (Emphasis supplied.)

As the district court was careful to note in its opinion (950 F. Supp. at 842 n.2), the first named plaintiff in this litigation and another disabled child, by the guardian *ad litem* in this litigation, had filed a companion class action suit in an Illinois court against two of the defendants, DCFS and DMHDD, in this litigation. *See David B. v. DeVito*, 86 Ill. App. 3d 787, 408 N.E.2d 275 (1st Dist. 1980). The trial court granted summary judgment in favor of the

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relief is needed.' [Citation omitted.] Thus, while the burden is . . . upon the defendant to show that a claim for injunctive relief has become *moot*, it lies with the plaintiff to show entitlement to the *remedy*." 690 F.2d at 1006 (emphases in original).

plaintiffs and issued an injunction, and the defendants appealed. 408 N.E.2d at 277-78. On July 11, 1980, the Appellate Court of Illinois for the First District reversed the trial court's certification of a class, ruling that it was improper under Illinois law because there was no evidence indicating that the class was so numerous as to render joinder impracticable. *Id.* at 278-79. The court also dismissed the appeal as to the named representatives of the class because the controversy as to them had become moot under Illinois law. *Id.* at 279. The court noted that after the matter was concluded in the trial court, DCFS, DMHDD, the Governor's office, and the Illinois Department of Corrections had set up a "Governor's Review" committee (now GYSI) for the purpose of serving the two plaintiffs and other similarly situated disabled children. Because the two named plaintiffs were receiving services, the case was moot. *Id.* at 278-79. Thus the drafters of the consent decree stated that the defendants had set up a program "unrelated to the course of *this* litigation," which the defendants continued to contest after the July 11, 1980, demise of the plaintiffs' state litigation.

The drafters' use of the word "unrelated" may imply many things, but it surely does not imply that the defendants in the federal litigation had carried, or had even attempted to carry, their heavy and stringent burden of demonstrating that, if the federal litigation was dismissed, there would be no reasonable expectation that they would resume their alleged violations of section 504 of the Rehabilitation Act. The Seventh Circuit's focus on the single word "unrelated" in the consent decree cannot possibly justify a remand to the district court for the defendants to prove now what they chose not to prove, and could not prove, in 1981.

The implication that the Seventh Circuit found in the preamble to the consent decree in this case could be found in many consent decrees, which by definition require that at some point the plaintiff(s) and the defendant(s) reach an agreement and are no longer "adverse."

Because the Seventh Circuit's decision would require a district court to determine whether a case or controversy existed *when the decree was entered*, it would eventually imperil most consent decrees. The older a decree becomes, the more difficult it will be to present evidence as to when and how the parties came to their agreement.[10]

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[10] The Seventh Circuit would additionally reach out to the Eleventh Amendment to limit this Court's voluntary cessation rule: "[B]ecause all three defendants are state officers, even a conclusion that the suit played some role in instigating a change of policy may not justify relief. *Ex parte Young*, 209 U.S. 123 (1908), permits a court to enter an injunction against state officials, but the court must use the minimum coercive force essential to achieve compliance with federal law. If the state brings itself into conformity with national law, then the court should terminate the litigation, for at that point the legal fiction of *Young* – that the state officers are acting outside the scope of their authority, therefore, are not the alter egos of the state, and therefore may be enjoined without violating the Eleventh Amendment – no longer applies." 116 F.3d at 1148. This view would clearly invalidate *all* institutional reform consent decrees to which the Eleventh Amendment applies. As noted above, however, the Seventh Circuit overlooked that Congress has abrogated the states' Eleventh Amendment sovereign immunity for claims under section 504 of the Rehabilitation Act. *See* section 1003(a)(1) of the Rehabilitation Act Amendments of 1986 (42 U.S.C. § 2000d-7(a)(1)). The Seventh Circuit's Eleventh Amendment concerns are therefore entirely misplaced.

CONCLUSION

For the foregoing reasons, the petitioners respectfully ask this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 96-3729

DAVID B., *et al.*,

Plaintiffs-Appellees,

v.

JESS MCDONALD, Director of the Illinois Department of Children and Family Services,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 79 C 1662 – Marvin E. Aspen, *Chief Judge.*

ARGUED MAY 13, 1997 – DECIDED JUNE 16, 1997

Before COFFEY, EASTERBROOK AND KANNE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* In 1981 the heads of three Illinois agencies – the Department of Mental Health and Developmental Disabilities, the Department of Children and Family Services (DCFS), and the State Board of Education – signed a consent decree promising to provide "appropriate" services to children, 17 years of age or less, who "[a]re in need of specialized services including, but not limited to child welfare, mental health and education." A program called the Governor's Youth Services

Initiative (GYSI) coordinates the way these agencies deal with teenagers. In 1995 the legislature of Illinois enacted a statute curtailing the DCFS's authority to provide services to children over the age of 13 who have been adjudicated "delinquent" but have not been found to be abused, neglected, or dependent. 20 ILCS 505/5(l). "Delinquency" in Illinois means crime. 705 ILCS 405 5-3(1). Acts that lead to this designation run the gamut from vehicular hijacking to sexual assault to murder. Confronted with potentially inconsistent obligations under the statute and the consent decree, the DCFS asked the district court to be relieved of any duty to provide services to delinquents over the age of 13. A change of law may justify, or even require, a modification of a consent decree, see *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992); *Evans v. Chicago*, 10 F.3d 474 (7th Cir. 1993) (en banc), unless a federal law independent of the decree requires the parties to continue as before. The only federal law that supports the decree is §504 of the Rehabilitation Act – according to the plaintiffs, before 1981 the agencies, all of which receive federal funds, denied assistance to some persons on account of their disabilities – and the DCFS argued that the Rehabilitation Act does not require it (or, indeed, any other agency of Illinois) to render special services to criminals.

Without addressing the agency's argument that federal law permits it to desist from providing services to delinquents over the age of 13, the district court denied the DCFS's motion to modify the decree. 950 F. Supp. 841 (1996). The district judge understood *Rufo* to permit modification of a consent decree only when "the substantive law . . . has so clearly and dramatically changed as to

render continued enforcement of the Consent Decree inequitable." 950 F. Supp. at 846. Federal law has not changed since 1981 in a sufficiently dramatic fashion to permit modification of the decree, the judge wrote. *Id.* at 846-51. As for *Evans*, which concluded that to prevent a state or local government from exercising its normal legislative powers, "there [must be] a substantial federal claim, not only when the decree is entered but also when it is enforced, [so] that the obligations imposed by the decree rest on this rule of federal law rather than the bare consent of the [former] officeholder" (10 F.3d at 479), the district judge concluded that *Evans* need not be followed. 950 F. Supp. at 845-46. The passage just quoted appears in the lead opinion, to which only five of the eleven participating judges subscribed. Judge Ripple, who cast the sixth vote supporting the judgment in *Evans*, did not approve (or disapprove) this part of the plurality opinion, see 10 F.3d at 483, and the district judge concluded that as a result *Evans* does not represent the law.

There is substantial doubt that the decree complies with either Article III or the Eleventh Amendment to the Constitution. The fifth paragraph in the decree's preamble recites that "[t]he defendants have, unrelated to the course of this litigation, established a program to provide services to plaintiffs, which, plaintiffs have agreed, meets their needs." This implies that, at the time the decree was entered, the parties were not adverse, and that the district court therefore lacked the case or controversy essential to federal jurisdiction. When a suit sets in motion a change of policy, a prospective judgment may be apt under the approach of *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 n. 14 (1986), and *United States v.*

W.T. Grant Co., 345 U.S. 629, 632 (1953): the decree prevents the defendants from reverting to their old ways as soon as the case ends. But a new policy unrelated to the litigation implies that the suit was unnecessary, and that the controversy is moot. What is more, because all three defendants are state officers, even a conclusion that the suit played some role in instigating a change of policy may not justify relief. *Ex parte Young*, 209 U.S. 123 (1908), permits a court to enter an injunction against state officials, but the court must use the minimum coercive force essential to achieve compliance with federal law. If the state brings itself into conformity with national law, then the court should terminate the litigation, for at that point the legal fiction of *Young* – that the state officers are acting outside the scope of their authority, therefore are not the alter egos of the state, and therefore may be enjoined without violating the Eleventh Amendment – no longer applies. *See Green v. Mansour*, 474 U.S. 64 (1985); *Mercer v. Magnant*, 40 F.3d 893 (7th Cir. 1994).

If the decree is consistent with Article III and the Eleventh Amendment, then the district court must grant the DCFS the relief it requests – if only because the decree has never had the effect the district court attributed to it. The DCFS asked the district court for relief because judges of the Circuit Court of Cook County recently directed the DCFS to take custody of some children, over 13 years of age, who had been adjudicated delinquent. These judges thought that the consent decree overrides 20 ILCS 505/5(l). Yet although the decree requires the three agencies to provide services to the defined class of children, it does not say which agency will provide which services. Indeed, it does not require the provision of any

particular service to any child. Instead it provides that when the Juvenile Court of Cook County refers a youngster to the GYSI, there must be a meeting including representatives of the three agencies within nine working days, following which "[i]nterim and long term service recommendations will be formulated; a comprehensive service plan is then developed." The GYSI's "Coordinator will be responsible for fully implementing [the plan's] goals and objectives." That's it. There are no details about which agency does which things, or what a plan must contain. Perhaps the whole decree is ineffectual for lack of specificity under Fed.R.Civ.P. 65(d), which provides that an injunction "shall describe in reasonable detail . . . the act or acts sought to be restrained". See also *Schmidt v. Lessard*, 414 U.S. 473 (1974). But whatever the decree may do, it does not explicitly direct the DCFS to provide services to persons over the age of 13 who have been adjudicated delinquent. It says that the State of Illinois must provide some assistance under a "comprehensive service plan" (whatever that may be), but when services of any kind are appropriate, what services those may be, how they are to be rendered, and by which agency, are things Illinois may work out for itself. Whatever ambiguity lurks in this decree – and there must be some, for why else did the state judges direct the DCFS to disregard 20 ILCS 505/5(*l*) on the decree's authority? – could and should have been dispelled by the district court.

Let us suppose, however, that we have not read between the lines correctly, and that the decree imposes

on the DCFS an obligation to take custody of some persons over the age of 13 who have been adjudicated delinquent. Then the decree should be modified to eliminate the conflict between its requirements and the new state statute. The district court believed that modification is proper only when "the substantive law . . . has so clearly and dramatically changed as to render continued enforcement of the Consent Decree inequitable." 950 F. Supp. at 846. Moreover, the court thought, only a change in *federal* substantive law matters. That is not what *Rufo* holds; indeed, the district court's approach is redolent of the losing side's contentions in *Rufo*. According to the Supreme Court, "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance." 502 U.S. at 383 (footnote omitted). The Court did not distinguish between legal and factual circumstances, or between state and federal law; change in any of these things may justify modification under Fed. R. Civ. P. 60(b)(5).

The Rehabilitation Act was reworded in 1990 when Congress enacted the Americans With Disabilities Act, but the amendment does not change anything substantive. The statute now reads: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. §794(a). The qualifier "solely by reason of her or his disability" makes it essential to

determine the ground on which exclusion from a program is based. That directs attention to the 1995 change in Illinois law: certain youths now are excluded from certain services provided by the DCFS, *not* by reason of disability (as might have been true before 1981) but by reason of criminal conviction. Such a change is "significant" in *Rufo*'s terminology, and modification of the decree so that the DCFS may conform its activities to both state and federal law would be "suitably tailored to the changed circumstance."

Plaintiffs do not contend that the crimes of those class members who have been adjudicated delinquent can be attributed to their disabilities. Cf. *Honig v. Doe*, 484 U.S. 305 (1988). For example, attention deficit hyperactivity disorder, which some class members display, may cause difficulties in learning and social interactions, but it does not "cause" murder or sexual assault – not in the legal sense, anyway, even if those with the disorder are statistically more likely to commit crimes. See *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995); cf. *Doe v. Board of Education of Oak Park*, No 96-3014 (7th Cir., May 27, 1997), slip op. 12-16. Nothing in the Rehabilitation Act requires states to disregard a person's criminal activity when deciding what social-welfare services to provide, and through which agency – even if a particular condition of eligibility happens to bear more heavily on those who have disabilities. See *Bryant v. Madigan*, 84 F.3d 246 (7th Cir. 1996); cf. *Traynor v. Turnage*, 485 U.S. 535 (1988); *Alexander v. Choate*, 469 U.S. 287 (1985); *Vaughn v. Sullivan*, 83 F.3d 907, 912-13 (7th Cir. 1996). Plaintiffs do not disagree with this view of the Rehabilitation Act so much as they disagree with the DCFS's reading of its options

under state law. Response requires nothing more than a citation to *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984): given the Eleventh Amendment, a federal court may not use disagreement with a state official's understanding of state law as the basis of relief.

Some of the district court's analysis implies that a state is stuck with its bargain if plaintiffs never had much of a case to begin with. If this class could not have prevailed on the merits in 1981, then adjustments in state and federal law that weaken its claims cannot be a "significant" change in the law. On this approach, the weaker the claim under federal law, the more enduring the rights under a consent decree. A state will be bound forever because it cannot demonstrate that the law has changed in its favor. *Evans* cuts off arguments of this kind by making a substantial federal claim essential to both entry and enforcement of a consent decree. Although, as the district judge observed, the critical language appears in an opinion joined by only five of the eleven members of the en banc court, the judge erred in supposing that if *Evans* does not by itself establish the point, then the proposition is not the law. Disagreement within the court in *Evans* had more to do with application of the principles to the problem at hand than with the identification of the rules that govern the entry, modification, and dissolution of consent decrees. See 10 F.3d at 485 (*Flaum & Kanne, JJ.*, dissenting, because they believed that a colorable constitutional theory supported the decree when entered *and* at the time of the decision en banc).

The plurality in *Evans* did not draw its legal analysis from thin air. The opinion discusses decisions of the Supreme Court, of this court, and of other circuits, as well

as some powerful considerations of political legitimacy – such as the fact that in a democracy the people may vote out politicians whose acts displease them, and elect new representatives who promise change. See 10 F.3d at 477-80. The Rehabilitation Act does not authorize politicians who hold office in one year to prevent their successors from charting a different course. See Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal Forum 295. Cases predating *Evans* accordingly hold that it takes more than the consent of public officials to support a federal court's entry and enforcement of an injunction; it takes a substantial claim based on federal law. *Alliance to End Repression v. Chicago*, 742 F.2d 1007 (7th Cir. 1984) (en banc); *People Who Care v. Rockford Board of Education*, 961 F.2d 1335 (7th Cir. 1992); *Kasper v. Board of Election Commissioners*, 814 F.2d 332, 340 (7th Cir. 1987); *White v. Roughton*, 689 F.2d 118 (7th Cir. 1982). See also Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L.Rev. 321 (1988). The message has been reiterated in this circuit since *Evans*. E.g., *Komyatti v. Bayh*, 96 F.3d 955, 962-63 (7th Cir. 1996). As *Komyatti* observed, the substantial-claim requirement does not permit a party to disregard the decree, but it does justify modification or vacatur. See also *Sweeton v. Brown*, 27 F.3d 1162 (6th Cir. 1994) (en banc). The district court should have implemented, rather than disdained, this element of the plurality opinion in *Evans*.

To sum up: on remand the district court must first determine whether a case or controversy existed when the decree was entered. If yes, then the court has two additional responsibilities. It must either construe or

modify the decree forthwith to permit Illinois to reallocate tasks among its agencies and to reduce the services offered to persons adjudicated delinquent. Then it must determine whether a substantial federal claim supports the decree as a whole; if not, the entire decree must be lifted and the task of shaping public policy be restored to persons today holding political office – subject only to whatever limitations federal law and the Supremacy Clause now place on the operation of the state's social-welfare system. See *B.H. v. McDonald*, 49 F.3d 294, 301-03 (7th Cir. 1995). Plaintiffs would be free at this stage to argue, for example, that the way in which the DCFS proposes to conduct itself would violate the Americans With Disabilities Act, which supplements the Rehabilitation Act. But arguments based on the ADA are new claims, which must be made and proved; they do not breathe life into a decree entered under a different legal regime. Relief under a statute enacted in 1990 cannot be justified on the basis of the agencies' consent in 1981. Cf. *Daniels v. Pipe Fitters Ass'n*, No. 96-2457 (7th Cir. May 5, 1997), slip op. 3. The judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

No. 96-3729

A true Copy:
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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID B., JAMES S., RICHARD D.)
CHRISTINE B., GERMAINE M.,)
Through their Guardian Ad Litem,)
PATRICK T. MURPHY, on behalf)
of themselves and a class of)
individuals too numerous and)
transitory to mention,)
)
Plaintiffs,) Case No.
) 79 C 1662
v.)
)
ANN PATLA, Director of the)
Illinois Department of Mental)
Health & Developmental)
Disabilities, JESS McDONALD,)
Director of the Illinois Department)
of Children and Family Services,)
and JOSEPH A. SPAGNOLO, State)
Superintendent of Education for)
the Illinois State Board of)
Education,)
)
Defendants.)

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, Chief Judge:

The parties settled this dispute almost fifteen years ago with the entry of a Consent Decree. One of the defendants, Jess McDonald, Director of the Illinois

Department of Children and Family Services ("DCFS"),[1] no longer wishes his agency to be bound by that agreement. The plaintiffs, a class of adolescent wards and potential wards of the Juvenile Court of Cook County who suffer from severe emotional, physical, or mental impairments, and who previously were denied necessary services by the defendant agencies, oppose any attempt to vacate or modify the Consent Decree. After careful consideration of the memoranda and supplemental memoranda submitted by the parties, we conclude that vacatur or modification of the Consent Decree is not warranted, and therefore deny the defendant's motion.

I. Background

The original complaint in this action was filed on April 25, 1979, but the relevant pleading for purposes of the instant motion is the Second Amended Complaint ("Complaint") filed on March 1, 1980.[2] The named plaintiffs – David B., James S., Richard D., Christine B., and Germaine M. – brought suit on behalf of a class of children in Cook County who (1) were either wards of the Juvenile Court or who had petitions for wardship pending against them in Juvenile Court, and (2) who suffered

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[1] All of the original defendants in this action, who were sued in their official capacities, have been succeeded since the entry of the Consent Decree. Accordingly, we have automatically substituted the current heads of the defendant agencies as the named defendants. Fed. R. Civ. P. 25(d)(1).

[2] A similar action was filed in August 1978 in the Circuit Court of Cook County, and was resolved pursuant to essentially the same settlement agreement reached in this case. *David B. v. DeVito*, 408 N.E.2d 275 (Ill. App. Ct. 1980).

from emotional, physical, or mental disabilities. Compl. ¶ 3. The Complaint alleges that the plaintiffs' disabilities caused them to commit delinquent and criminal acts, leading the Illinois State's Attorney's Office or other entities to petition for orders adjudicating them wards of the Juvenile Court. *See* 705 ILCS 405/2-13 (abused, neglected, dependent minors), 405/5-13 (delinquent minors). In most cases, however, the State's Attorney's Office did not consider the offenses serious enough, or the children culpable enough, to prosecute the delinquency petitions or seek commitment of the children to the Illinois Department of Corrections ("DOC"). Compl. ¶ 11. While children in this situation would usually be released to the custody of their parents or guardians, the children in the plaintiff class demonstrated such severe mental and emotional disabilities that their families were unable to adequately treat and care for them. *Id.* ¶¶ 10, 13. Instead of incarcerating these children at the DOC, where treatment options were severely limited, judges of the Juvenile Court sought to place these youngsters with various state agencies that could provide treatment and care for them.

However, the plaintiffs alleged that the defendants – the heads of DCFS, the Illinois Department of Mental Health and Developmental Disabilities ("DMHDD"), and the State Board of Education ("SBE") – refused to provide them with necessary services and treatment because of their disabilities. All of the defendant agencies took the position that the children were either too disabled or not disabled enough to receive public services or public funds for private care. Thus, despite the fact that these children had mental and emotional disabilities, DMHDD decided that they were not entitled to treatment from

DMHDD because they did not require extended hospitalization. Complaint ¶ 12. DCFS conceded that many of these individuals were neglected and abused, and thus would normally be entitled to assistance, but the agency maintained that the plaintiffs were not entitled to DCFS services because either they were not so abused as to require placement outside the family, or they were too disruptive to be placed with other DCFS children. *Id.* ¶¶ 13, 29-30. SBE acknowledged that these children had special educational needs, but considered them the problem of DMHDD and DCFS because they required placement in residential treatment programs. As a result, these children "fell between the placement cracks," and were left to fend for themselves at the DOC or on the streets. *Id.* ¶¶ 11-23.

The putative class action Complaint alleged that the defendants denied the plaintiffs necessary services because of their disabilities, and that this conduct violated Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. On September 4, 1980, Judge John Powers Crowley denied the defendants' motion to dismiss the Complaint in an unpublished opinion. The court concluded it could not dismiss the plaintiffs' equal protection claims because, based on the allegations in the Complaint, not even a rational basis had been proffered for the refusal to treat these children. The court also rejected the defendants' attack on the Rehabilitation Act claims, finding that the Complaint sufficiently alleged (1) that the plaintiffs were disabled, (2) that they were "otherwise qualified" for the defendants' services, and (3) that they were being

excluded from these services "solely by reason" of their disability.[3]

The action was reassigned to this court on June 30, 1981, and in late 1981 the parties proposed to resolve the matter through the entry of a Consent Decree. Under the Consent Decree, those children under the age of seventeen (or twenty if already wards of the Juvenile Court) who are referred to the Juvenile Court and alleged to have violated the Illinois Juvenile Court Act, and are in need of "specialized services" such as welfare, mental health treatment, and education, but who have been refused such treatment by the defendant agencies, shall be referred to the Governor's Youth Services Initiative ("GYSI"). Decree at 4-5. The GYSI, a unit staffed by members of DCFS, DMHDD, and SBE, would be entrusted with the obligation of "ensur[ing] that this population of children receive appropriate care and treatment under the least restrictive conditions as may be required in each individual case." *Id.* at 5. Although the Consent Decree does not obligate GYSI or any of its members to take wardship of the plaintiffs, it does require the unit to promptly review referrals, formulate "interim and long term service recommendations" for each child, and develop a "comprehensive service plan" to carry out these recommendations. *Id.* On October 2, 1981, we approved this Consent Decree, entered final

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[3] The Court also rejected SBE's argument that it owed no duty to provide education services to disabled children. However, the Court did dismiss the claims of three Juvenile Court probation officers for lack of standing, as well as all claims against the Secretary of the United States Department of Health and Human Services.

judgment on all claims, and retained jurisdiction over the cause to enforce the terms of the decree.

There is no real dispute that since the entry of the Consent Decree, GYSI has operated rather smoothly in its evaluation and placement of children in the plaintiff class. After hearing a delinquency petition against a child with mental or emotional disabilities, a juvenile court judge will refer that child to GYSI if the judge concludes that commitment of the child to DOC would be inappropriate. After receiving a report on each child from the probation department, a GYSI panel comprised of representatives from the defendant agencies evaluates each referral and proposes recommendations. For most of the children, GYSI recommends residential placement in a facility that can provide adequate supervision and treatment. Since none of the defendant agencies operates this type of facility, the children are usually placed with private treatment providers that bill the defendants for the cost. Although the Consent Decree does not explicitly apportion the costs of such treatment among the defendants, in practice DCFS has borne approximately one-third of the cost of treating these individuals. Since the entry of the Consent Decree, none of the parties has come before this court to request enforcement or modification of the agreement.

However, DCFS now contends that because of changes in federal and state law since 1980, the plaintiffs no longer have a substantial federal claim supporting enforcement of the Consent Decree.[4] Specifically, the

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[4] DCFS also argues that many of the children referred to GYSI are charged with a wide range of rather violent offenses,

defendant maintains that its rejection of the plaintiffs does not violate the Rehabilitation Act because this decision is not made "solely" by reason of the plaintiffs' disabilities. Alternatively, DCFS maintains that recent amendments to both its enabling statute and the Juvenile Court Act prevent the agency from paying for services provided to minors above the age of thirteen who are charged with criminal conduct or adjudged delinquent. Therefore, DCFS argues, this substantial change in Illinois law removes any valid federal claim for many of the plaintiffs since these persons are no longer "otherwise qualified" for DCFS services. The agency contends it should no longer be obligated by the Consent Decree, or at a minimum, DCFS should not be required to pay for the residential treatment of those over age thirteen who have been charged with a crime or adjudicated delinquent.[5]

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and that the treatments proposed by GYSI have become more expensive because of the dangerous propensities these children possess. However, DCFS does not argue that these changes are so unexpected and significant in themselves to justify vacatur or modification of the decree. Thus, we need only consider this argument to the extent it illuminates our understanding of the operation of GYSI and the recent enactments of the Illinois legislature.

[5] The heads of the other defendant agencies have not objected to DCFS's motion.

II. Standard for Vacating or Modifying a Consent Decree

Despite the fact that all the parties to this dispute voluntarily agreed to abide by the terms of the Consent Decree, this does not preclude DCFS from arguing that its obligations under the decree should be lifted. In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992), the Supreme Court held that although consent decrees are contractual in nature, they are essentially judicial decrees that may be modified according to the rules applicable to other judgments and decrees. Specifically, consent decrees may be modified or vacated pursuant to Federal Rule of Civil Procedure 60(b)(5):

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. . . .

"A party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo*, 502 U.S. at 383. Although district courts must be flexible in their application of Rule 60(b)(5), in general, modification or vacatur of a consent decree will be justifiable only if the movant shows "a significant change either in factual conditions or the law." *Id.* at 384, 393. The former sort of change must be a significant factual variation that the parties did not anticipate at the time they entered into the

decree. *Id.* at 384-85. The latter type of change may include alterations in federal law that now prohibit a party from performing its obligations under the decree, or changes that "make legal what the decree was designed to prevent." *Id.* at 388. The Court in *Rufo* further explained that "[w]hile a decision that clarifies the law will not, in and of itself, provide a basis for modifying a decree, it could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law." *Id.* at 390. Thus, after considering whether the district court properly exercised its discretion in refusing to modify a consent decree covering a county jail, the Court remanded for the district court to determine whether (1) the increase in the population of pretrial detainees was unexpected at the time of the decree, or (2) the parties misunderstood the law regarding "double-celling" of inmates at the time they signed the decree. If either of these conditions existed, the administrators of the county jail were entitled to argue that modification of the consent decree was warranted.[6]

In *Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993) (*Evans III*), *cert. denied*, 114 S. Ct. 1831 (1994), the Seventh Circuit sitting en banc addressed the impact of *Rufo* on consent decrees entered against municipalities. The plaintiffs in *Evans III* had based their claims on the Due

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[6] Although the Supreme Court spoke only of modification in *Rufo*, the defendant's primary argument for vacatur is based on subsequent changes in the law. We see no reason why *Rufo* would not apply to DCFS's request to vacate the Consent Decree, and therefore analyze the issue according to the standards outlined in that case.

Process and Equal Protection Clauses, and originally a portion of these claims had been upheld by a panel of the Seventh Circuit. *Evans v. Chicago*, 689 F.2d 1286, 1299-1300 (7th Cir. 1982) (*Evans I*). However, a subsequent panel reversed this decision, *Evans v. City of Chicago*, 873 F.2d 1007, 1015-18 (7th Cir. 1989) (*Evans II*), and on the third consideration by the Seventh Circuit a plurality of the court vacated the consent decree that had been entered into by the parties during the years between *Evans I* and *Evans II*. The plurality in *Evans III* reasoned that the consent decree did not actually settle the issues between the parties, *id.* at 476-77, and that even if it did, concerns of federalism and democracy prevented the district court from enforcing the decree after the federal claims had been rejected in *Evans II*, *id.* at 477-481. The plurality concluded that the City of Chicago could no longer be held to the terms of a consent decree previously entered into by the parties, because the "entry and continued enforcement of a consent decree regulating the operation of a governmental body depend on the existence of a substantial claim under federal law." *Id.* at 480. Judge Ripple concurred in the judgment of the court, but refused to adopt the broad tenets advocated by the plurality for dealing with federal consent decrees entered into by municipalities. *Evans III*, 10 F.3d at 483 (Ripple, J., concurring). Rather, he simply concluded that – under the unique procedural posture of the case – the prevailing law had changed to such a degree as to render continued enforcement of the decree against the City of Chicago "inappropriate." *Id.*

Although DCFS argues that we are bound to accept the reasoning of the plurality opinion in *Evans III*, and

therefore must vacate the instant decree if we find no substantial federal claim underlying the plaintiffs' Complaint, we do not believe *Evans III* so constrains us. At least with regard to interpreting Supreme Court opinions:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [a majority of] Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . . "

Marks v. United States, 430 U.S. 188, 193 (1977) (*quoting Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)); *accord Romano v. Oklahoma*, 114 S. Ct. 2004, 2010 (1994). No opinion in *Evans III* commanded a majority of judges on the Court of Appeals, and thus the holding of the case is the narrower grounds adopted by Judge Ripple. That is, vacatur of a consent decree must be granted to a defendant when a prior decision upholding the plaintiff's legal theory is subsequently overruled by the same (or higher) court.

Outside of unusual cases where the federal law basis permitting a federal court to enforce a consent decree has disappeared, however, we believe the Supreme Court's more general analysis in *Rufo* controls our resolution of motions to vacate or modify consent decrees. Thus, to prevail on its motion, DCFS must demonstrate that the substantive law underlying the plaintiffs' Complaint has so clearly and dramatically changed as to render continued enforcement of the Consent Decree inequitable. *See* Fed. R. Civ. P. 60(b)(5); *Rufo*, 502 U.S. at 388-90.

III. Discussion

The defendant's motion springs from recently enacted Illinois legislation that alters the mandate of DCFS with regard to children accused or adjudicated of delinquent offenses. Prior to June 1995, the enabling statute for DCFS allowed the agency, at its discretion, to "accept for care and training any child [aged 13 or older] who has been adjudicated delinquent, addicted, as a truant minor in need of supervision[,] or as a minor requiring authoritative intervention," and required the agency to accept those delinquents under the age of thirteen. 20 ILCS 505/5(*l*) (West 1993). However, in 1995 the State of Illinois amended this statute to read, in pertinent part:

> The Department may, at its discretion except for those children also adjudicated neglected or dependent, accept for care and training any child who has been adjudicated addicted, as a truant minor in need of supervision or as a minor requiring authoritative intervention, under the Juvenile Court Act or the Juvenile Court Act of 1987, but no such child shall be committed to the Department by any court without the approval of the Department. A minor charged with a criminal offense under the Criminal Code of 1961 or adjudicated delinquent shall not be placed in the custody of or committed to the Department by any court, except a minor less than 13 years of age committed to the Department under Section 5-23 of the Juvenile Court Act of 1987. . . .

20 ILCS 505/5(*l*) (West Supp.1996) (as amended by P.A. 89-21). Based on the new language in this statute,[7] DCFS has taken the position that it can no longer "serve" members of the plaintiff class aged thirteen and over through GYSI, and has sought to effectuate this reading in various Juvenile Court proceedings.[8] Both the Public Guardian and the Juvenile Court have prevented DCFS from backing out of GYSI, relying on their reading of the Consent Decree in this case. DCFS now seeks to vacate or modify the Consent Decree so that its obligations under the decree conform to the agency's interpretation of 505/5(*l*).

The agency's primary contention is that the plaintiffs no longer have a viable claim under Section 504 the Rehabilitation Act to support their complaint. Section 504 currently reads:

> No *otherwise qualified* individual with a disability in the United States, as defined in section 706(8) of this title, shall, *solely by reason* of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

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[7] P.A. 89-21 also amended several provisions of the Juvenile Court Act to include similar language. *See* 705 ILCS 405/2-10, 405/2-27, 405/5-23. However, DCFS does not contend that these additional amendments raise separate grounds for vacating or modifying the decree.

[8] DCFS does not dispute that it must provide services to those under the age of thirteen who are adjudicated delinquent.

29 U.S.C. § 794(a) (emphases added). DCFS first argues, based on federal case law decided after entry of the Consent Decree, that its exclusion of the plaintiffs from GYSI is not undertaken "solely by reason" of the plaintiffs' disabilities, and therefore not actionable under Section 504. Specifically, the defendant points to *Traynor v. Turnage*, 485 U.S. 535, 549-51 (1988), in which the Supreme Court considered whether Congress' prohibition against extending the time for receiving veterans' benefits to those who were disabled because of their own "willful misconduct," 38 U.S.C. § 3462(a)(1) (previously 38 U.S.C. § 1662(a)(1)), along with the Veterans Administration regulation interpreting that provision as applying to alcoholics, violated the Rehabilitation Act. The Court observed that in enacting later amendments to the Rehabilitation Act, Congress did not repeal or amend this "willful misconduct" provision in the VA statute, nor did it "expressly disavow its [prior] determination that primary alcoholism is not the sort of disability that warrants an exemption from the time constraints of § [3462(a)(1)]." *Id.* at 547. Thus, the Court concluded that the broad language of Section 504 did not repeal the more specific prohibition against extending certain benefits to those whose disabilities are caused by "willful misconduct." *Id.* 547-48. In discussing why this reading of these statutes was not implausible, the Court stated:

> [T]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons. . . . Congress is entitled to establish priorities for the allocation of limited resources available for veterans' benefits, and thereby to

> conclude that veterans who bear some responsibility for their disabilities have no stronger claim to an extended eligibility period than do able-bodied veterans. Those veterans are not, in the words of § 504, denied benefits "solely by reason of [their] handicap," but because they engaged with some degree of willfulness in the conduct that caused them to become disabled.

485 U.S. at 549-50 (citations omitted). Using similar reasoning, the defendant argues that Section 504 is inapplicable to DCFS's decision to exclude the plaintiffs from GYSI because of their delinquent behavior.

We do not think the matter is as free from doubt as DCFS would have us believe. The above quoted language from *Traynor* does not directly bear on the issue presented in the instant case, since the actual question in *Traynor* was whether Congress had created an exception to the scope of Section 504, not whether a state legislature may do so.[9] In addition, the rule of law extrapolated by DCFS from *Traynor* – that Section 504 is not concerned about discrimination between groups of disabled persons, or about discrimination based on the severity of one's disability – is directly contradicted by a Department of Health and Human Services ("HHS") regulation interpreting the Rehabilitation Act. 45 C.F.R. § 84.4(b)(iv)[10]; *see*

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[9] Indeed, a Department of Health and Human Services regulation interpreting § 504 states that the Rehabilitation Act does not prohibit "exclusion of a specific class of handicapped persons from a program *limited by Federal statute* or executive order to a different class of handicapped persons." 45 C.F.R. § 84.4(c) (emphasis added).

[10] "A recipient [of federal funds], in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of

also 28 C.F.R. § 35.130 (Department of Justice regulation for ADA that mirrors § 84.4). Indeed, Judge Crowley relied upon this same HHS regulation when he rejected a similar argument raised by DCFS in 1980, and neither HHS nor Congress has seen fit to alter the language of this provision since that time.

Moreover, the lower courts have not uniformly adopted the defendant's interpretation of Section 504. To be sure, some courts have suggested that discriminating between groups of handicapped persons does not violate Section 504. *E.g., Colin K. by John K. v. Schmidt*, 715 F.2d 1, 9 (1st Cir. 1983). However, several others have concluded that the severity of one's disability can itself be disability, and that the denial of services based on the severity of a handicap would contravene Section 504. *Wagner by Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1016 n. 15 (3d Cir. 1995) ("While section 504 does not apply to programs choosing among similarly handicapped people, an action under section 504 exists if a program is found to discriminate between distinct classes of handicapped persons."); *Plummer v. Branstad*, 731 F.2d 574, 578 (8th Cir. 1984); *Messier v. Southbury Training Sch.*, 916 F.Supp. 133, 141 (D.

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handicap: . . . Provide different or separate aid, benefits, or services to handicapped persons or *to any class of handicapped persons* unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others. . . . " 45 C.F.R. 84.4(b)(iv) (emphasis added). Because these regulations "were drafted with the oversight and approval of Congress," they are considered "an important source of guidance on the meaning of § 504." *Traynor*, 485 U.S. at 549 (quotations and citations omitted).

Conn. 1996) (collecting cases); *McGuire v. Switzer*, 734 F.Supp. 99, 114-15 (S.D.N.Y. 1990) (permitting paraplegic's § 504 claim of discrimination vis-a-vis blind persons); *Clark v. Cohen*, 613 F.Supp. 684, 692 n. 6, 693-94 (E.D. Pa. 1985) (recognizing possibility of such a claim under § 504), *aff'd*, 794 F.2d 79 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986). Indeed, at least two district courts have explicitly rejected the argument that *Traynor* precludes the application of Section 504 to discriminatory actions undertaken because of the severity of a disability. *Messier*, 916 F.Supp. at 142 n. 7; *Martin v. Voinovich*, 840 F.Supp. 1175, 1191-92 (S.D. Ohio 1993).

We need not weigh in on this debate. For purposes of deciding the instant motion, it is sufficient to state that the plaintiffs allege they have been discriminated against because of the severity of their disabilities, and that DCFS has not demonstrated this sort of a claim to clearly fall outside the purview of Section 504. The cases and regulations supporting the plaintiffs' claim that they were discriminated against "solely by reason" of their disability have not been overruled, *cf. Evans III*, 10 F.3d at 480-81 (*plurality*); *Id.* at 483 (Ripple, J., concurring), and it is far from conclusive that the law is to the contrary, *cf. Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994) (vacating consent decree based on clear and indisputable change in decisional law underlying the plaintiffs' complaint), *cert. denied*, 115 S. Ct. 1118 (1995). In sum, the defendant has not carried its burden of showing a significant change in the law on this point to justify modification or vacatur.[11]

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[11] The additional cases cited by DCFS do not show otherwise. The plaintiff in *Talley v. Lane*, 13 F.3d 1031, 1034 (7th

DCFS's second argument is based on the "otherwise qualified" requirement of Section 504. "An otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). To determine whether an individual is "otherwise qualified," reference must be made to the state statute or regulation outlining the eligibility requirements of the program receiving federal funding. *Dempsey by Dempsey v. Ladd*, 840 F.2d 638, 640 (9th Cir. 1987). Under the defendant's reading of 20 ILCS 505/5(*l*), DCFS is prohibited from providing the plaintiffs with any services to treat their mental and emotional disabilities because they have been brought before the Juvenile Court on delinquency petitions. Therefore, DCFS argues, the plaintiffs are no longer "otherwise qualified" for DCFS services, and their exclusion from the GYSI program does not subvert Section 504.

Although DCFS repeatedly insists that 505/5(*l*) now prohibits the provision of "services" to delinquent youths, Def.'s Mem. at 10, 11, 23; Def.'s Reply Mem. at 12,

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Cir. 1994), only alleged that he had been denied public housing because of his past criminal record, not because of any disability. *Id.* at 1034. Moreover, the Court of Appeals analyzed the issue according to whether the plaintiff was "otherwise qualified" for the benefit, not whether his exclusion was "solely by reason" of a disability. *Id.* Similarly, *Anderson v. University of Wisconsin*, 841 F.2d 737, 740 (7th Cir. 1988), dealt with the question of whether an alcoholic who failed to meet a university's academic requirements was "otherwise qualified" to remain at the institution's law school. The issue presented in these cases – the applicability of the "otherwise qualified" prong of Section 504 – is discussed more fully below.

we do not believe this interpretation is supported by the text of the statute. Initially, the defendant relies on the following portion of the revised 505/5(*l*) to support its argument:

> A minor charged with a criminal offense under the Criminal Code of 1961 or adjudicated delinquent *shall not be placed in the custody of or committed to the Department* by any court. . . .

(emphasis added). The statute does not say that DCFS is prohibited from providing "services" to delinquent individuals, but rather, that these persons cannot be thrust into the "custody" of DCFS or "committed to" DCFS by a Juvenile Court. The Juvenile Court Act defines "legal custody" as a relationship created by court order whereby a custodian is responsible for physical possession, protection, training, and sustenance of the minor. 705 ILCS 405/1-3(9) (West 1996). Similarly, the Juvenile Court Act uses the terms "commitment" and "placement" to indicate the transfer of legal custody of a minor child, along with the concomitant responsibilities of such custody, to another individual or agency pursuant to court order. *See* 705 ILCS 405/2-23, 405/2-27, 405/5-23, 405/5-29 (West 1996).[12] This interpretation is supported by *In re C.T.*, 666 N.E.2d 888, 890-91 (Ill. App. Ct. 1996), in which the Illinois Appellate Court for the Second District reversed a Juvenile Court order appointing DCFS the legal guardian of a minor who had been adjudicated delinquent. The court stated that the statutes at issue

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[12] *See also* 705 ILCS 405/5-33(3) (requiring appointment of Assistant Director of Corrections as legal custodian for any minor "commit[ted]" to the DOC).

"set[ ] forth a clear prohibition on the *commitment* of such minors to the *custody* of DCFS, excepting only those minors less than 13 years of age," and concluded that the minor's "*commitment to the custody* of DCFS was improper." *Id.* at 891 (emphasis added).

In contrast, referral to GYSI does not equate to "commitment to the custody of DCFS," since it does not entail the transfer of "legal custody" to DCFS, and the agency is not saddled with the "responsibility of physical protection" of the minors referred by the Juvenile Court. Although the parties disagree on which agency or entity performs which functions in the course of a GYSI placement, the essential operations of the GYSI scheme are not disputed. Initially, the Juvenile Court refers a minor to GYSI after concluding that treatment services are more appropriate than commitment to the DOC, and all alternative avenues of obtaining treatment have been exhausted. The GYSI representatives determine whether the minor requires residential treatment or other assistance, and present their treatment recommendations to the court. If the court approves the plan, GYSI representatives from the participating agencies prepare the necessary documentation and arrangements. Where the minor is to be sent for residential treatment outside Illinois, the Juvenile Court makes a finding of delinquency and adjudges the child a ward of the court, leaving the parents as legal guardians of the minor. If the facility outside Illinois accepts the child, the court orders the minor placed on probation with the condition that he fully cooperate with the staff at the facility chosen by GYSI. None of the GYSI agencies become the minor's guardian or legal custodian, nor do they indicate that they have

such authority when arranging the child's treatment. In sum, nothing in the GYSI process leads to the placement of minors into the "custody of or commit[ment] to" DCFS.[13] Rather, participation in GYSI and the Consent Decree is consistent with the agency's charge to "establish and maintain tax-supported child welfare services . . . to the end that services and care shall be available on an equal basis throughout the State to children requiring such services," 20 ILCS 505/5(c), and its obligation to provide "child welfare services," 20 ILCS 505/5(a)(3).[14]

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[13] Indeed, the enabling statute for GYSI does not even mention the terms "custody," "commitment," or "placement." *See* 20 ILCS 505/17a-11.

[14] "Child welfare services" means public social services which are directed toward the accomplishment of the following purposes:

(A) protecting and promoting the welfare of children, including homeless, dependent or neglected children;

(B) preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation or delinquency of children;

(C) preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing the breakup of the family where the prevention of child removal is desirable and possible;

(D) restoring to their families children who have been removed, by the provision of services to the child and the families;

Perhaps realizing these problems with its argument, DCFS has changed course in its supplemental briefing and now relies on a different portion of 505/5(*l*) to support its contention that the plaintiffs are not "otherwise eligible" for DCFS services. DCFS maintains that because P.A. 89-21 removed the word "delinquent" from the portion of the statute authorizing the agency to "accept for care and training any child who has been adjudicated addicted, as a truant minor in need of supervision or as a minor requiring authoritative intervention," the legislature must have intended to remove DCFS's authority to provide services to delinquent minors through any program, including GYSI.

As with the defendant's initial attack, we find this view of the law unsupported by the text of 505/5(*l*). In pertinent part, the relevant provision of the statute reads:

> [DCFS] may, at its discretion except for those children also adjudicated neglected or dependent, accept for care and training any child who

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> (E) placing children in suitable adoptive homes, in cases where restoration to the biological family is not possible or appropriate;
>
> (F) assuring adequate care of children away from their homes, in cases where the child cannot be returned home or cannot be placed for adoption;
>
> (G) providing supportive services and living maintenance which contribute to the physical, emotional and social well-being of children who are pregnant and unmarried;
>
> (H) providing shelter and independent living services for homeless youth. . . .
>
> 20 ILCS 505/5(a)(3).

> has been adjudicated addicted, as a truant minor in need of supervision or as a minor requiring authoritative intervention, . . . but no such child shall be committed to [DCFS] by any court without the approval of [DCFS].

20 ILCS 505/5(*l*). When read in context, it is apparent that the phrase "accept for care and training" refers to the action taken by DCFS when the Juvenile Court commits a minor to the custody of the agency. This interpretation is further supported by the immediately preceding subsection, which states that DCFS "shall accept for care and training any child who had been adjudicated neglected or abused, or dependent *committed* to it pursuant to the Juvenile Court Act or the Juvenile Court Act of 1987." 20 ILCS 505/5(k) (West 1996) (emphasis added). Under this view of the statute, the purpose of deleting the term "delinquent" from the list of those who may be accepted for "care and training" is obvious: given that the paragraph goes on to prohibit the Juvenile Court from "plac[ing] in the custody of or committ[ing] to the Department" any minor charged with a criminal offense or adjudged delinquent, it would make no sense if the same subsection required DCFS to nonetheless accept such children for "care and training."

At bottom, DCFS asks this court to interpret the amendments contained in P.A. 89-21 to say that the agency cannot be made to pay for any services for abused and neglected children who have been charged with a crime or deemed delinquent. However, given that the Illinois legislature could easily have included such language in DCFS's enabling statute, but instead chose only to restrict the ability of the Juvenile Court to "commit"

delinquents to DCFS or place them in the agency's "custody," DCFS's interpretation cannot be accepted. Because Illinois law does not preclude the plaintiffs from receiving DCFS services based on their delinquency, DCFS has failed to demonstrate that these children are not "otherwise qualified" for such services. Accordingly, we conclude that the defendant has not satisfied its burden of showing the substantial change in law needed to justify modification or vacatur of the Consent Decree, and its motion must be denied.[15]

IV. Conclusion

We are cognizant of the federalism concerns implicated any time a federal court requires a state agency to conform its conduct to a judicial decree. Nonetheless, DCFS freely agreed to settle this dispute over a decade ago on the terms outlined in the Consent Decree. There is no indication that performance under the decree has been rendered terribly impracticable due to unexpected changes in the factual circumstances, or that the parties entered into the decree while laboring under a misconception of the law. *See Rufo*, 502 U.S. at 385, 390. Nor is it apparent that the federal claims raised by the plaintiffs in their Complaint are insubstantial. Thus, we see no

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[15] As we have rejected the defendant's attack on the Rehabilitation Act claim in the Complaint, we need not address the other arguments raised by DCFS against the due process and equal protection claims.

grounds for relieving DCFS from the obligations it voluntarily undertook in 1981. For these reasons, the defendant's motion to vacate or modify the Consent Decree is denied. It is so ordered.

/s/ Marvin E. Aspen
MARVIN E. ASPEN
United States District Judge

Dated 9/27/96

APPENDIX C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 5, 1997.

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

DAVID B., *et al.*, *Plaintiffs-Appellees*, **No.** 96-3729 **v.** JESS MCDONALD, Director of the Illinois Department of Children and Family Services, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 79 C 1662 Marvin E. Aspen, *Chief Judge.*

Order

Plantiffs-appellees filed a petition for rehearing and suggestion of rehearing en banc on June 30, 1997. No judge in regular active service has requested a vote on the suggestion of rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Judge Rovner took no part in the decision.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 96-3729

DAVID B., JAMES S., RICHARD D., CHRISTINE B., GERMAINE M., through their Guardian Ad Litem, PATRICK T. MURPHY, on behalf of themselves and a class of individuals too numerous and transitory to mention, Plaintiffs-Appellees, v. JESS MCDONALD, Director of the Illinois Department of Children and Family Services, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 79 C 1662 Honorable Marvin E. Aspen, District Judge Presiding.

SUGGESTION OF REHEARING EN BANC OF PLAINTIFFS-APPELLEES

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ORAL ARGUMENT REQUESTED

Certificate of Interest

The undersigned, Ron Fritsch, one of the attorneys of record for the plaintiffs-appellees, furnishes the following list in compliance with Circuit Rule 26.1:

(1) The full names of every party that the counsels of record for the plaintiffs-appellees represent in this case:

> David B. James S. Richard D., Christine B., Germaine M., through their guardian ad litem, Patrick T. Murphy, on behalf of themselves and a class of individuals too numerous and transitory to mention.

(2) All of the plaintiffs-appellees are individual persons.

(3) The names of all law firms whose partners or associates have appeared for the plaintiffs-appellees in

this case or are expected to appear for the plaintiffs-appellees in this Court:

Office of the Cook County Public guardian, 2245 West Ogden Avenue, Fourth Floor, Chicago, Illinois 60612, and Northwestern University Legal Clinic, Children and Family Justice Center, Northwestern University School of Law, 357 East Chicago Avenue, Suite 374, Chicago, Illinois 60611.

/s/ Ron Fritsch
Ron Fritsch

Certificate of Service

I, Ron Fritsch, hereby certify that I caused three copies each, two print and one electronic media, of this suggestion of rehearing en banc to be served upon Barbara L. Greenspan, Assistant Attorney General, Child Welfare Litigation Bureau, Office of the Attorney General Of Illinois, 100 West Randolph Street, Suite 4-600, Chicago, Illinois 60601, and Jan E. Hughes, Assistant Attorney General, Civil Appeals Bureau, Office of the Attorney General of Illinois, 100 West Randolph Street, 12th Floor, Chicago, Illinois 60601, by hand delivery on June 30,1997.

/s/ Ron Fritsch
Ron Fritsch

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STATEMENT REQUIRED BY CIRCUIT RULE 35(b)

The June 16, 1997 decision by a panel of this Court conflicts with the decision of the United States Supreme Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), and this Court's decisions in *Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993) ("*Evans III*"); *Kindred v. Duckworth*, 9 F.3d 638 (7th Cir. 1993); and *Komyatti v. Bayh*, 96 F.3d 955 (7th Cir. 1996), by ruling that a state official's mere understanding that a state law has changed so as to relieve that official of any further obligations under *federal* law, no matter how erroneous or misguided the understanding may be, can, in and of itself, amount to the "significant change in factual conditions or in law" that *Rufo* requires (502 U.S. at 384) under Rule 60(b)(5) of the Federal Rules of Civil Procedure to justify modification or vacatur of a consent decree, and, more frightening still, the decision grossly misapplies *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), by ruling that federal courts are powerless, on Eleventh Amendment grounds, to determine for themselves whether the state law in fact relieves the official of obligations under *federal* law.

ARGUMENT

I. The decision erred in ruling that a state official's mere understanding that a state law has changed is sufficient to justify modification or vacatur of a consent decree based entirely on federal law.

A. A state official's interpretation (or, in this case, misinterpretation) of a state law is not sufficient to justify modification or vacatur of a consent decree based on federal law.

The decision directs the district court, on remand, to "either construe or modify the decree forthwith to permit Illinois to reallocate tasks among its agencies and to reduce the services offered to persons adjudicated delinquent." Slip op. at 8. The decision bases this direction on the apparent assumption that a 1995 amendment of § 5, subsection (l), of the Children and Family Services Act (20 ILCS 505/5(l)), included in Public Act 89-21 ("89-21"), curtails "DCFS's authority to provide services to children over the age of 13 who have been adjudicated 'delinquent.' "[1] Slip. op. at 2. The decision thus concludes, without any analysis, that as a result of 89-21, "certain youths now are excluded from certain services provided by the DCFS, *not* by reason of disability (as might have been true before 1981) but by reason of criminal conviction."[2] Slip op. at 6 (emphasis in original).

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[1] Whatever the effect of the amendment, it applies to children over the age of 12, not 13. The Illinois legislature excepted minors "less than 13 years of age."

[2] Again, whatever the effect of the amendment, it deals with children "adjudicated delinquent" in the juvenile court, *not* those convicted in a criminal court.

The decision ignores the plaintiffs' argument that 89-21 does not prohibit DCFS from providing *services to*, as opposed to *taking custody of*, children 13 to 17 who have been adjudicated delinquent, and therefore does not conflict with any provision in the consent decree. Even more troubling, the decision pays no attention to Chief Judge Aspen's painstaking analysis of 89-21 and his conclusion that "Illinois law does not preclude the plaintiff's from receiving DCFS services based on their delinquency." *David B. v. Patla*, 950 F. Supp. 841, 849-51 (N.D. Ill. 1996). The decision instead accuses Chief Judge Aspen of taking an "approach redolent of the losing side's contentions in *Rufo*," and thinking that "only a change in *federal* substantive law matters." Slip op. at 5 (emphasis in original). To the contrary, Chief Judge Aspen obviously thought that a change in state law could be "the substantial change in law needed to justify modification or vacature of the Consent Decree." 950 F. Supp. at 851. In fact, Chief Judge Aspen was so concerned with the question of whether state law had changed that before issuing his opinion, he required the parties to file supplemental briefs on the status of state law on two separate occasions.

The decision clarifies, however, why it is unnecessary to consider whether 89-21 does in fact conflict with the consent decree. The decision holds that *Rufo* does not require an *actual* change in state law. Instead, taking *Rufo* and its progeny well beyond where they have ever gone before, the decision rules that a state official's *mere understanding*, no matter how erroneous, that a state law has changed will do:

> Plaintiffs do not disagree with [the panel's] view of the Rehabilitation Act so much as they disagree with the DCFS's reading of its options under state law. Response requires nothing more than a citation to *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984): given the Eleventh Amendment, *a federal court may not use disagreement with a state official's understanding of state law as the basis of relief.*

Slip op. at 6 (emphasis supplied).

The decision has thus turned *Pennhurst* upside down, or inside out, to reach the astonishing and radical conclusion that, under *Rufo* and *Evans III*, a state official's mere understanding of state law, regardless of what the law actually says, can require a federal court to vacate or modify a consent decree. The reliance upon *Pennhurst* in the present appeal is grossly misplaced. In *Pennhurst*, the class plaintiffs asked a federal court to enforce state law by issuing an injunction against a state official. 465 U.S. at 103-123. In the present case, the class plaintiffs asked a federal court to enforce *federal* law, *not* state law. The state law in question came into the case only because one defendant, DCFS, alleged that the law, 89-21, no longer allows it to do what it agreed to do in the consent decree – provide services to the plaintiffs.

In any event, *Pennhurst*, which relies, as the decision notes, on the Eleventh Amendment, cannot apply to the consent decree here, which is based upon § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794(a)). Congress has seen fit to abrogate state immunity under the Eleventh Amendment in suits in federal court for violations of § 504. *See* 42 U.S.C. § 2000d-7(a)(1).

If the decision's recasting of *Rufo*, *Evans III*, and *Pennhurst* becomes the law of the land, few institutional reform consent decrees will remain standing – not if a state official's interpretation of state law is all it takes to require a federal court to modify or vacate such a decree. Whatever the standard that the Supreme Court imposed in *Rufo*, and whatever the standard that this Court has imposed in either the plurality or concurring opinions in *Evans III*, they both clearly contemplated an actual change in law and not merely a state official's understanding that a state law has changed.

Both *Rufo* and *Evans III* surely also anticipated that the federal court would make the decision that the law had changed and not merely assume, as the decision does, that the state official's understanding is correct. Indeed, Article III requires the court, *not* a state official, to make that decision. A federal court must reserve to itself "full authority . . . to deal with matters of law." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982). Accordingly, "full authority" to decide whether state law has sufficiently changed to relieve state officials of their obligations *under federal law* must be vested in the district court and cannot be delegated to a state official. In the present case, "full authority" to decide whether 89-21 changed Illinois law must, consistent with Article III, be vested in the district court, *not* DCFS.

B. Chief Judge Aspen correctly ruled that Illinois law has not changed in such a manner as to create a conflict with the consent decree.

In 89-21, the Illinois legislature inserted the following proviso in § 5(l) of the Children and Family Services Act (emphasis supplied): "A minor charged with a criminal offense under the Criminal Code of 1961 or adjudicated delinquent *shall not be placed in the custody of or committed to* [DCFS] by any court. . . . " The legislature has defined "legal custody" in § 1-3, subsection (9), of the Juvenile Court Act of 1987 (705 ILCS 405/1-3(9)):

> "Legal custody" means the *relationship created by an order of court* in the best interests of the minor which imposes on the custodian the *responsibility of physical possession of a minor* and the *duty to protect, train and discipline him* and to provide him with food, shelter, education and ordinary medical care.

(Emphasis supplied.) Section 1-3(9) makes it clear that "legal custody" entails far more than the provision of services to a child. It sets forth, in the conjunctive, three additional requirements: (1) A court must create the relationship in an order. (2) The order must impose upon the custodian the "responsibility of physical possession" of the child. (3) The order must also impose upon the custodian the "duty to protect, train and discipline" the child.

The use of the word "commit" in the Juvenile Court Act of 1987 shows that the legislature intended to require the same three circumstances: a court order creating the relationship, a court-imposed "responsibility of physical possession," and a court-imposed "duty to protect, train and discipline." Section 2-27, subsection (2) of the Act

(705 ILCS 405/2-27(2)), in the case of abused, neglected or dependent children, and § 5-29, subsection (3) (705 ILCS 405/5-29(3)), in the case of delinquent children, provide that the juvenile court may "place" them with or "commit" them to relatives, other persons and various agencies. These sections also make it clear that the individuals and agencies to whom the children are committed, or with whom they are placed, have a court-ordered "responsibility of physical possession" of them and a court-ordered "duty to protect, train and discipline" them. Both §§ 2-27 and 5-29 provide (emphasis supplied):

> When a minor is *placed* with a suitable relative or other person . . . , the court shall appoint him the *legal custodian or guardian of the person of the minor*. When a minor is *committed* to any agency, the court shall appoint the proper officer or representative thereof as *legal custodian or guardian of the person of the minor.* Legal custodians and guardians of the person of the minor have *the respective rights and duties set forth in subsection (9) of Section 1-3* except as otherwise provided by order of court. . . .

When the juvenile court refers children to the Governor's Youth Services Initiative ("GYSI") under the consent decree, it does not place them in the custody of DCFS or commit them to DCFS at any step along the way. Chief Judge Aspen meticulously described the GYSI process in his decision and concluded that under the consent decree DCFS only funds services for delinquent children. *David B. v. Patla*, 950 F. Supp. at 849-50. He further concluded as follows (*Id.* at 851):

> At bottom, DCFS asks this court to interpret the amendments contained in P.A. 89-21 to say

> that the agency cannot be made to pay for any services for abused and neglected children who have been charged with a crime or deemed delinquent. However, given that the Illinois legislature could easily have included such language in DCFS's enabling statute, but instead chose only to restrict the ability of the Juvenile Court to "commit" delinquents to DCFS or place them in the agency's "custody," DCFS's interpretation cannot be accepted. . . . Illinois law does not preclude the plaintiffs from receiving DCFS services based on their delinquency. . . .

Rufo and *Evans III* do not require a federal court to modify or vacate a consent decree based upon a state official's clearly erroneous and self-serving interpretation of a state law.

C. This Court should certify to the Illinois Supreme Court, pursuant to Circuit Rule 52 and Illinois Supreme Court Rule 20, the question of the validity of 89-21 under the single subject rule of the Illinois constitution.

On May 22, 1997, after the oral argument in this appeal, the Illinois Supreme Court held, in *Johnson v. Edgar*, 1997 WL 274809 (Ill.), that Public Act 89-428 ("89-428") was unconstitutional under the "single subject rule" in article IV, section 8(d), of the Illinois Constitution of 1970 (Ill. Const. art. IV, § 8(d)). The rule requires that "[b]ills, except bills for appropriations and for the codification, revision or rearrangement of laws, shall be confined to one subject."

89-428 contained a multitude of subject matters, in six articles, all presumably relating to "public safety."

89-21 is an equally abundant enactment, containing in several equally ample articles, its multitude of subject matters, including, *inter alia*, state employee group insurance, state pensions, administrative procedure, the road fund, disabled persons, prompt payment act, school technology, tobacco tax, nursing homes, public assistance, and riverboat gambling. Whatever else 89-21 may be in relation to the consent decree in the present case, its validity under the Illinois constitution is now in grave doubt.

Rule 20 of the Supreme Court of Illinois provides for certification to that court by this Court of a question arising under the laws of Illinois that will control the outcome of a case pending in this Court. If this Court should conclude that Chief Judge Aspen's interpretation of 89-21 is in error, and that DCFS's understanding is correct, the plaintiffs move this Court to certify to the Illinois Supreme Court, under Circuit Rule 52, the question whether 89-21 is unconstitutional under the single subject rule in the Illinois constitution.[3]

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[3] Prior to oral argument in this appeal, DCFS notified this Court that on May 21, 1997, the Illinois Supreme Court would hear oral argument in *In re A.A.*, Nos. 81711 and 81800, a case in which a downstate circuit court ruled the parts of 89-21 applicable to this appeal unconstitutional as violative of the equal protection clause. The attorneys for the class plaintiffs have learned that, after the oral argument in *A.A.*, the attorneys for the appellee in the office of the State's Attorneys Appellate Prosecutor sent a letter to the Illinois Supreme Court citing *Johnson v. Edgar* as additional authority for the argument that 89-21 was unconstitutional. Whether or not this Court grants the plaintiffs' Rule 52 motion, this Court should refrain from deciding this petition for rehearing until the Illinois Supreme

II. The decision erred in ruling that Chief Judge Aspen failed to determine whether a substantial federal claim under § 504 of the Rehabilitation Act of 1973 supports the consent decree.

A. Chief Judge Aspen properly determined that a substantial federal claim under § 504 supports the consent decree.

The decision also instructs Chief Judge Aspen to "determine whether a substantial federal claim supports the [consent] decree as a whole; if not, the entire decree must be lifted. . . . " Slip op. at 8. The instruction seems puzzling because Chief Judge Aspen *did determine* that a substantial federal claim supports the consent decree:

> [T]he plaintiffs allege they have been discriminated against because of the severity of their disabilities, and . . . DCFS has not demonstrated this sort of a claim to clearly fall outside the purview of Section 504. The cases and regulations supporting the plaintiffs' claim that they were discriminated against "solely by reason" of their disability have not been overruled, . . . and it is far from conclusive that the law is to the contrary.

950 F. Supp. at 848. In light of Chief Judge Aspen's finding, there is no need for this Court to remand the case

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Court issues its ruling on the constitutionality of 89-21 in *A.A.* Of course, this Court need not wait for the Illinois Supreme Court's ruling if, upon rehearing, this Court agrees that Chief Judge Aspen's interpretation of 89-21 is correct and that state law has not changed significantly so as to release DCFS from its obligations under the consent decree.

back to him to determine whether a substantial federal claim supports the consent decree.

The law fully supports his ruling on this issue. The plaintiffs have argued in the district court and this Court that a respectable line of authority, holding that discrimination on the basis of the severity of disability can violate § 504, fully supports their claim. *See, e.g., Wagner v. Fair Acres Geriatric Center,* 49 F.3d 1002 (3d Cir. 1995). *See also* Plaintiffs-Appellees' Brief at 18-25 and additional authorities cited therein.

In fact, 17 years ago, Judge Crowley denied the defendants' motion to dismiss the second amended complaint. *David B. v. deVito,* No. 79 C 1662, slip op. (N.D. Ill. Sept. 4, 1980) (pp. A-19 to A-22 of DCFS's separately bound appendix). As Chief Judge Aspen noted in his opinion, Judge Crowley expressly relied on a regulation promulgated under § 504 in finding that the plaintiffs stated a valid federal claim. 950 F. Supp. at 848. The regulation states that a recipient of federal financial assistance may not

> [p]rovide different or separate aid, benefits, or services to handicapped persons *or to any class of handicapped persons* unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others.

45 C.F.R. § 84.4(b)(1)(iv) (emphasis supplied). As Chief Judge Aspen further noted, that regulation is still in effect today. Stated differently, as Chief Judge Aspen observed in his opinion, the regulatory and decisional law upon which Judge Crowley based his ruling in 1980 that the

plaintiffs stated a valid federal claim have not changed and remain in effect today. 950 F. Supp. at 848.

The decision, however, does not address Chief Judge Aspen's determination that a substantial federal claim supports the decree, or the decisional and regulatory basis for that claim. Nor does the decision address Chief Judge Aspen's concise and accurate statement of the plaintiffs' claim under § 504 (citing their second amended complaint) (950 F. Supp. at 843):

> [T]he plaintiffs alleged that the defendants – the heads of DCFS, the Illinois Department of Mental Health and Developmental Disabilities ("DMHDD"), and the State Board of Education ("SBE") – refused to provide them with necessary services and treatment because of their disabilities. All of the defendant agencies took the position that the children were either too disabled or not disabled enough to receive public services or public funds for private care. Thus, despite the fact that these children had mental and emotional disabilities, DMHDD decided that they were not entitled to treatment from DMHDD because they did not require extended hospitalization. Complaint ¶ 12. DCFS conceded that many of these individuals were neglected and abused, and thus would normally be entitled to assistance, but the agency maintained that the plaintiffs were not entitled to DCFS services because either they were not so abused as to require placement outside the family, or they were too disruptive to be placed with other DCFS children. *Id.* ¶¶ 13, 29-30. SBE acknowledged that these children had special educational needs, but considered them the problem of DMHDD and DCFS because they required

> placement in residential treatment programs. As a result, these children "fell between the placement cracks," and were left to fend for themselves at the DOC or on the streets. *Id.* ¶¶ 11-23.[4]

Instead, the decision apparently quarrels with Chief Judge Aspen's understanding that rule 60(b)(5) requires DCFS to demonstrate "a significant change in the law" in order to have the fifteen-year-old consent decree vacated or modified. *Id.* But in *Rufo*, in holding that Rule 60(b)(5) applies to consent decrees, the United States Supreme Court ruled that a party seeking to modify an institutional reform decree must establish "either a significant change in factual conditions or in law." 502 U.S. at 378, 384. The Court also emphasized that a district court may not modify such a decree simply because a party now finds it inconvenient to live with it:

> Although we hold that a district court should exercise flexibility in considering requests for modification of an institutional reform consent decree, it does not follow that a modification will be warranted in all circumstances. Rule 60(b)(5) provides that a party may obtain relief from a court order when "it is no longer equitable that the judgment should have prospective application," not when it is no

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[4] The decision also mischaracterizes the nature of the plaintiffs' claim under § 504: "Plaintiffs do not contend that the crimes of those class members who have been adjudicated delinquent can be attributed to their disabilities." Slip op. at 6. Chief Judge Aspen, however, got it right: "The [second amended c]omplaint alleges that the plaintiffs' disabilities caused them to commit delinquent and criminal acts." 950 F. Supp. at 843.

> longer convenient to live with the terms of a consent decree. Accordingly, a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree.

Id. at 383. The Court ruled that a district court may modify a consent decree "when the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Id.* at 388. The Court stressed, however, that a change in the law does not, by itself, justify modification of a consent decree:

> [W]e have no doubt that, to "save themselves the time, expense, and inevitable risk of litigation," [citation omitted], petitioners could settle the dispute . . . by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also more than what a court would have ordered absent the settlement. . . .
>
> To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation.

Id. at 389.

The June 16 decision in the present case, however, insists that a district court must modify or vacate a consent decree even where there is no significant change in the law or the facts. This should be done where a claim is weak to begin with because "then adjustments in state

and federal law that weaken its claims cannot be a 'significant' change in the law." Slip op. at 7. Surely, however, if a change in the law reduces a claim below substantially, then a significant, even dramatic, change in the law has occurred for a consent decree resting on that claim, however strong the claim was to begin with. There is thus no need to challenge *Rufo's* requirement of a significant change in the law.

In any event, a substantial federal claim under § 504 of the Rehabilitation Act supports the consent decree in the present case, as the plaintiffs argued in the district court and in this Court, and as Chief Judge Aspen specifically ruled. Therefore, because the plaintiffs currently have a substantial federal claim, it does not matter whether the plurality opinion in *Evans*, or Judge Ripple's concurring opinion, which relied on a change in the prevailing law (10 F.3d at 483), represents the law in the Seventh Circuit. Under either standard, DCFS's motion to vacate or modify the consent decree must fail.

B. The decision violated the clear error rule for review of findings of fact by relying upon a version of the facts directly contrary to Chief Judge Aspen's findings.

Many of the problems in the decision arise from a misreading of what the consent decree does and does not require DCFS and the other state agencies to do through GYSI. First, the statement in the decision that the decree requires GYSI "to render special services to criminals" (slip op. at 2) is simply not correct. The decree requires GYSI neither to render services to *criminals* nor to render

special services to anybody. The consent decree defines the plaintiffs as "actual *or potential* wards of the Juvenile Court of Cook County who suffer from emotional, physical or mental disabilities." Consent Decree at Preamble (emphasis supplied). The decree does not require that they be adjudicated delinquent, let alone convicted of a crime. They need only be "referred to Juvenile Court" and "*alleged* to have engaged in conduct or [have] *parents [who] are alleged* to have engaged in conduct in violation of the Illinois Juvenile Court Act. . . . " Consent Decree at ¶ 1B and C (emphasis supplied). The decision ignores Chief Judge Aspen's pertinent finding that "[i]n most cases, . . . the State's Attorney's Office *did not consider the offense serious enough, or the children culpable enough,* to prosecute the delinquency petitions or seek commitment of the children to the Illinois Department of Corrections ("DOC")." 950 F. Supp. at 843 (emphasis supplied).[5]

In further describing the operation of GYSI under the decree, the decision mistakenly states:

> [T]he decree has never had the effect the district court attributed to it. The DCFS asked the district court for relief because judges of the Circuit Court of Cook County recently directed the DCFS to take custody of some children, over 13 [sic] years of age, who had been adjudicated

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[5] The decision states that "[d]elinquency in Illinois means crime," and "[a]cts that lead to this designation run the gamut from vehicular hijacking to sexual assault to murder." Slip op. at 2. In fact, the "gamut" may run *to* murder, but it runs *from* curfew violations, purchasing cigarettes, gambling, shoplifting, and possessing alcoholic beverages and marijuana.

> delinquent. These judges thought that the consent decree overrides [89-21]. Yet although the decree requires the three agencies to provide services to the defined class of children, it does not say which agency will provide which services.

Slip op. at 4. The decision apparently refers to the *downstate* judges who have ordered DCFS to take custody of delinquent children quite apart from the consent decree, which applies only to the juvenile court of Cook County. *See In re C.T.*, 281 Ill. App. 3d 189, 666 N.E.2d 888 (2d Dist. 1996), and *In re C.M.*, 282 Ill. App. 3d 990, 669 N.E.2d 707 (3d Dist. 1996). The Circuit Court of Cook County judges have *never* ordered DCFS to take custody of children under the consent decree, but they have insisted that the three defendant agencies, *operating as GYSI*, continue to provide the services that the decree requires them to provide. (Those judges are also fully aware that 89-21 does not prohibit DCFS from providing services to delinquent children.)

This Court reviews "findings of historical fact by the district court under the clearly erroneous standard." *Pennington v. Doherty*, 110 F.3d 502, 506 (7th Cir. 1997). The decision, however, relies upon its own version of the facts, which have no basis whatsoever in the record. As such, the decision tramples the clear error rule for review of findings by the district court.

III. The decision erred in ordering Chief Judge Aspen to determine whether a case or controversy existed when he entered the consent decree in 1981.

The decision further directs Chief Judge Aspen to "determine whether a case or controversy existed when the decree was entered." Slip op. at 8. The decision bases this instruction on the fifth paragraph in the preamble to the consent decree: "The defendants have, unrelated to the course of this litigation, established a program to provide services to plaintiffs, which, plaintiffs have agreed, meets their needs." The decision states that the paragraph "implies that, at the time the decree was entered, the parties were not adverse, and that the district court therefore lacked the case or controversy essential to federal jurisdiction." Slip op. 3.[6]

The decision acknowledges, citing *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 n. 14 (1986), and *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), that "[w]hen a suit sets in motion a change of policy, a prospective judgment may be apt . . . ; the decree prevents the defendants from reverting to their old ways as soon as the case ends." Slip op. at 3. That is exactly the situation in this case, which the plaintiffs filed in 1979, eventually setting in motion the negotiations that led to the 1981 consent decree.

The implication that the decision finds in paragraph five of the preamble could be found in many consent

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[6] None of the defendants has ever raised this issue in this litigation. The plaintiffs were given no opportunity to brief the question, and it was not mentioned at oral argument.

decrees, which by definition require that at some point the plaintiff(s) and the defendant(s) reach an agreement and are no longer "adverse." Because the decision requires a district court to determine whether a case or controversy existed *when the decree was entered*, it will eventually imperil most consent decrees. The older a decree becomes, the more difficult it will be to present evidence as to when and how the parties came to their agreement.

The decision would additionally reach out to the Eleventh Amendment to limit the Supreme Court's policy change doctrine under *Chicago Teachers Union* and *W.T. Grant*:

> [B]ecause all three defendants are state officers, even a conclusion that the suit played some role in instigating a change of policy may not justify relief. *Ex parte Young*, 209 U.S. 123 (1908), permits a court to enter an injunction against state officials, but the court must use the minimum coercive force essential to achieve compliance with federal law. If the state brings itself into conformity with national law, then the court should terminate the litigation, for at that point the legal fiction of *Young* – that the state officers are acting outside the scope of their authority, therefore are not the alter egos of the state, and therefore may be enjoined without violating the Eleventh Amendment – no longer applies.

Slip op. at 3-4. This view would clearly invalidate *all* institutional reform consent decrees to which the Eleventh Amendment applies. As noted above, however, the decision overlooks that Congress has abrogated the states' Eleventh Amendment sovereign immunity for claims under § 504 of the Rehabilitation Act. *See* 42 U.S.C. § 2000d-7(a)(1). The Eleventh Amendment concerns in the decision are therefore entirely misplaced.

CONCLUSION

For the reasons set forth in this suggestion, the plaintiffs respectfully request that this Court (1) rehear this appeal en banc; (2) in the alternative, if this Court disagrees with Chief Judge Aspen's interpretation of 89-21, certify to the Illinois Supreme Court the question whether 89-21 violates the single subject rule in the Illinois constitution, or refrain from deciding whether to rehear this appeal pending the decision of the Illinois Supreme Court in *In re A.A.*; and (3) affirm the district court's order entered September 27, 1996, denying DCFS's motion to vacate or modify the consent decree.

Respectfully submitted,

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID B., et al., Plaintiffs, v. DR. ROBERT deVITO, et al., Defendants.	)	No. 79 C 1662

SECOND AMENDED COMPLAINT

(Filed Mar. 1, 1980)

I

JURISDICTION

1. Jurisdiction of this Court is envoked [sic] pursuant to Title 28 USC Section 31 and Section 1343. The Plaintiff seeks declaratory and injunctive relief under Title 28 USC Section 2201 and 2202 and Title 42 USC Section 1983. Jurisdiction to grant an injunction against the actions of the Defendants is vested in this court by 28 USC Section 2281 and 2284. Venue is conferred by 28 USC Section 1391(b).

II

TYPE OF PROCEEDINGS

2. This is a class action for declaratory and injunctive relief. Plaintiffs seek a declaration that the actions of Defendants Coler, deVito and Cronin and their agents,

employees and superiors in discriminating against the Plaintiffs and refusing to provide them with adequate care and custody because of their emotional, physical and mental handicaps violate their rights to the due processes and equal protection of the laws as protected by the Fourteenth Amendment to the United States Constitution and also are in violation of Section 504 of the Rehabilitation Act of 1973 (29 USC 794).

III

PARTIES

3. Each of the named juvenile Plaintiffs is either a ward of the Juvenile Court of Cook County or has a Petition pending against him or her seeking that he or she be made a ward of the Juvenile Court of Cook County. Each of the individuals is a juvenile who suffers from an emotional, physical and/or mental disablement and each has been referred to the Department of Children and Family Services and/or the Department of Mental Health for services and/or placement.

4. Plaintiffs Peggy Rogers and Irene Nelson are Probation Officers at the Juvenile Court of Cook County and liaison workers between the Court's advocacy services and the Department of Children and Family Services and the Department of Mental Health and Developmental Disabilities. As part of their duties, Plaintiffs Rogers and Nelson assist in obtaining placements for children with emotional disabilities or mental retardation and who require such training, assistance, rehabilitation and therapy as can only be provided in an institutional or quasi-institutional placement. For such placements, Plaintiffs

Rogers and Nelson must rely upon Defendants Coler, deVito and their employees and agents with DCFS and DMHDD and have in fact made referrals for all Plaintiffs to DMHDD and DCFS, as well as for hundreds of other Plaintiffs similarly situated.

5. The Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their own behalf and on behalf of all other handicapped children residing in Illinois and who are affected by the discrimination set forth in the Factual Allegations Section below. The claims of the representative parties are typical of the claims of the class. The representative parties fairly and adequately protect the interest of the class. The Defendants have acted or refused to act on grounds generally applicable to this case, thereby making appropriate final injunctive relief with respect to the class as a whole.

6. Defendant Robert deVito is the Director of DMHDD and, as such, is legally mandated to care for children who suffer from emotional disablement, emotional disorders, mental diseases, mental impairment or mental retardation both by Illinois and Federal law.

7. Defendant Gregory Coler is the Director of DCFS and as such is mandated both by Illinois and Federal law to provide services for children who cannot live at home and who require special services to prevent them from becoming dependent, delinquent, emotionally disturbed or abandoned and for whom no other services are provided for within the state.

8. Defendant Joseph Califano is the Director of the Department of Health and Welfare (hereinafter HEW) and as such is legally mandated to monitor Defendants

deVito, Coler and Cronin to assure that they are not discriminating against individuals because of race or emotional or mental disability. It if is determined that Defendants deVito and Coler are discriminating on the basis of race or emotional disturbance or mental impairment, he must direct that Federal funds be terminated from DMHDD, DCFS or I.O.E.

9. Defendant Joseph Cronin is the Superintendent of the Illinois Office of Education and as such is responsible to insure that all handicapped children between the ages of 3 and 21 receive services for the handicapped either within the public school system or, if the children are not in a position to attend school, Defendant Cronin through his agents and employees or through individual school districts must insure that the children receive adequate education outside the school districts to assist their mental/or emotional disablement.

IV

FACTUAL ALLEGATIONS

HISTORICAL PERSPECTIVE

10. The Plaintiffs and members of their class comprise what is referred to in the social service jargon of DCFS, DMHDD, DOC, IOE and of various Juvenile Courts as "children who fall between the placement cracks." DCFS has taken the position that they are to care for physically abused, neglected and orphaned youngsters. In general, DMHDD has taken the position that they are to care for severely retarded individuals and children who are undergoing a psychotically acting out mental illness episode. DOC must, of course, take all

youngsters committed there by the Courts for the adjudication of a delinquency. IOE must educate emotionally disabled youngsters unless they cannot be educated within the school system and then are responsible to educate them outside of the school system. IOE has taken the position that they will not compel the various Boards of Education to take an aggressive attitude toward the placement of ED and MR children – that is if the child drops out of school because of a variety of reasons it is not for the District to pursue the child to attempt to make a placement outside the District but the family must seek assistance of the District. However, in cases such as the instant ones, there is usually no family or, at best, a disintegrated family which is unable to pursue the best interests of the child.

11. The result of all this has been that many children who cannot live at home because of moderate retardation and/or emotional disturbance become involved in petty delinquent behavior and are brought to the attention of the Juvenile Courts. The petty delinquent behavior is not such as to require that they be sent to the Department of Corrections and, indeed, in each of the cases mentioned herein, the States Attorney's Office does not seek to have the child committed to the Illinois Department of Corrections. However, at the same time, both DCFS and DMHDD have suggested in many of the cases that the child be sent to the Department of Corrections despite the fact that neither the chief prosecuting authority of the County nor the probation officer nor the Judge, him or herself wishes to incarcerate the youngster.

12. In brief, the children who comprise the class in the present lawsuit are those who are not so psychotic or

schizophrenic as to require long-term or DMHDD placement and although some could benefit from short-term hospitalization (as in the case of David B., Daniel C., Charles S., James S. and Richard D.) all would require a non-DMHDD placement within a short period of time.

13. All of the named Plaintiffs in the class of Plaintiffs whom they represent require placement outside of the home. Eventually some could live at home but only with adequate back-up services. However, DCFS provides no facilities themselves and must rely upon the private sector for the placement of these individuals. Though DCFS of course pays the private sector for such assistance, DCFS does not compel these agencies to accept youngsters. The result often is that the agencies accept the "better" youngsters and avoid those who "fall between the placement cracks" as too difficult to handle.

INDIVIDUAL PARTIES

14. David B. previously had been hospitalized as a youth at Pritzker's Children's Hospital for approximately five months for his emotional disablement. For the past two years, he has lived at home only intermittently, being at one time or another in a mental hospital, taking care of himself or living in a DCFS shelter home. In May, 1978, he allegedly set fire to his father's home and at that time a delinquency petition was filed against him and he was detained at the Audy Center for approximately four months.

15. All parties involved in David's case admit that he cannot live at home and that he requires a structured therapeutic atmosphere. In the summer and early fall of

1978, his Juvenile Court Probation Officer and the Juvenile Court Advocate both sought intervention by DCFS and by DMHDD. However, agents and employees of Defendant Coler refused to accept him for placement arguing that no private agency would accept him. DMHDD argued that he was not emotionally disturbed enough to be placed in one of their programs. Ultimately along with Daniel C. and Charles P. (below) he filed suit in the Circuit Court of Cook County seeking to compel either DCFS or DMHDD to place him. In the middle of a hearing for Preliminary Injunctive Relief, DMHDD agreed to accept him for placement in their program at Tinley Park Mental Health Center. When Tinley Park was closed, he was transferred to Chicago-Read.

16. After David's initial six weeks at the Tinley Park Mental Health Center, DMHDD authorities agreed that he no longer required mental health care. However, neither DCFS nor DMHDD made any assertive efforts to place him. Attorneys for both agencies refused to allow the social workers and psychologists who allegedly were working with David to speak with David's lawyers. The result has been that David cannot live at home, that DCFS and DMHDD refused to place him and that he continues to be hospitalized only because attorneys for the State recognize that his own lawyers cannot push for his release because he would have to be detained at the Juvenile Detention Center, having no other place to live. In the meantime, both agents and employees of Defendants Coler and deVito continue to discriminate against David by hospitalizing him when he does not need such hospitalization and refusing to place him outside of the hospital.

17. James S. is presently 13 years old. He has been a ward of DCFS and Defendant Coler since 1976. According to his Juvenile Court reports, he comes from a very disintegrated family, his mother having died, his brother being retarded and one sister being extremely emotionally disturbed. All the children were adjudicated neglected and made wards of the Court and all of the children have been in and out of various placements. James himself has been in several foster homes and at least two institutions. He was recently returned home with DCFS arguing that they had no alternative placement possibilities for him but admitting that he needs placement. Presently he resides at home with his fifteen year old sister and his father. According to school authorities he has attended school less than one-third of all possible school days since his return home and has been suspended twice. Probation officers at the Juvenile Court, have asked DCFS to take the child out of the home or, in the alternative, to provide the home with adequate backup services to insure that the psychopathology presently existing in the home does not increase and does not harm James S. and that somehow James be motivated to attend school or that he be placed in a special school. James was recently suspended from school for assaulting a teacher at the school.

18. Richard D. has been hospitalized on at lease [sic] five occasions in various psychiatric facilities in the past three years. He suffers from emotional disorders and is borderline retarded. He has attended school only sporadically in the last five or six years and cannot read or write. During the past eight months Juvenile Court Advocates and Plaintiffs herein, Rogers and Nelson have

attempted to compel DCFS to fulfill its mandated duties toward Richard and/or have the DMHDD provide services for him. During this time Richard's parents have moved from the Uptown neighborhood in Chicago to Hammond, Indiana to Maywood and to Forest Park. Richard has been confined at the maximum security Juvenile Detention Home for approximately four months on a Minor In Need of Supervision charge. He has escaped from a psychiatric ward on two occasions and the Juvenile Court once. On one occasion he suffered frostbite and had to be hospitalized and on another occasion he was stabbed in a street brawl. Richard is passive but is given liquor and drugs by older individuals who attempt to use him.

19. Richard D., like David B. above was referred to DCFS on many occasions but that agency refused to accept him for placement. Finally be admitted to being a Minor In Need Of Supervision and DCFS accepted custody over him. The position of the DCFS frequently is that they will not accept for placement a youngster who has no place to live and whose parents have either abandoned (as in the case of David B. above) or who are admittedly totally ineffectual because of a variety of problems (such as is the case with Richard D. herein). DCFS at times attempts to compel DMHDD to accept the youngsters for placement even though such hospitalization may be ultimately totally inappropriate.

20. Plaintiff Christine B. is presently 16 years of age and has been a ward of DCFS since 5 October 1977. Since that time she has been at the Tinley Park Mental Health Center on two occasions having been released most recently approximately three months ago when Tinley

Park insisted that she was not psychotic. At the same time the most secure facility with which DCFS contracts, the Jaspa House (of the GAP) program stated that Christine was too psychotic for their program and that they could not handle her. Christine was placed in a foster home over the objections of Plaintiffs Rodgers and Nelson by DCFS. Immediately she became involved in self-mutilation in the foster home and ran away. She claimed to have lived with a pimp. Subsequently Plaintiffs Nelson and Rodgers were able to talk her into returning home, no other placement being offered by DCFS. At the home she was beaten by her parent and compelled to babysit for her five siblings despite the fact that she is of school age and should be attending school. After being beaten she called Plaintiff Rodgers and stated that she did not know if she could control herself and that she herself felt compelled to beat her younger siblings. Her parents were not home. Ms. Rodgers called both DCFS and the police. The police went to the home and waited approximately 30 minutes for DCFS to appear. When they never appeared, the police took all the children into police custody. Since that time, Plaintiff Christine B. has been placed at the non-structured, non-secure, non-therapeutic center conducted by DCFS in the Northwestern suburbs, Herrick House. On the last Court date when Christine was due in Court, the DCFS workers stated she could not be brought to Court because she was too suicidal. Yet, DCFS still refuses to place her in any type of environment where she could receive mental health services. DMHDD is apparently unable to place Christine because they have no long term programs for girls (although long term programs for boys do exist).

21. Plaintiff Germaine M. has been a ward of DCFS since 1971 and has been in and out of 14 placements (not including many detentions at the Juvenile Detention Center). She has been both at the Madden Mental Health Center and at the Tinley Park Mental Health Center conducted by DMHDD.

22. On March 15, 1979 the Illinois State Psychiatric Institute of DMHDD released Germaine M. stating that she required long term hospital but that ISPI did not provide such care. (Another of the problems and ironies with DMHDD is that if one hospital such as ISPI does not provide long term care in their programs then they might release the child – as they did in the instant case – and not attempt to place the child in a long term secure setting.) Of course, in these instances it was impossible to place Germaine in a long term, secure setting inasmuch as DMHDD conducts such programs only for boys. DCFS then placed Germaine into a foster home over the objections of Plaintiff Nelson. Within two weeks the foster mother called stating that Germaine was out of control and breaking furniture. Germaine M. spent the next two days sleeping on couches at various DCFS offices and ran away on two occasions to return on both occasions. On the last occasion she began to throw furniture about and finally got a knife, threatening both herself and others. She was hospitalized at that point, again at ISPI. However, she is soon to be released as no longer psychotic. Germaine M. requires long term psychiatric care but at the present time neither DCFS nor DMHDD is willing to provide it. The 16 March, 1979 report from ISPI clearly pointed out the need for long term therapeutic institutional care.

23. Plaintiffs Irene Nelson, Peggy Rodgers and Carol Zientek are Probation Officers employed by the Juvenile Division of the Circuit Court of Cook County. All three are assigned to the advocacy unit and as such attempt to advocate for wards of the Court with DMHDD, DCFS and the Educational bureaucracies. One or all of them have attempted to obtain adequate placement of each of the named juvenile Plaintiffs above. However, despite repeated efforts to obtain assistance primarily from DCFS and DMHDD they have been repeatedly rebuffed in each of the cases.

24. Defendant deVito and his employees have developed a set of circumstances wherein they selectively accept for placement in their facilities some mentally ill and retarded youngsters while rejecting other mentally ill and retarded children. Defendant deVito and DMHDD will accept for placement only those youngsters who are undergoing a psychotic episode or who once having undergone such psychotic episode are mentally disabled and not causing behavioral problems within DMHDD facilities. Frequently the result is that DMHDD will only treat those children who create no disturbances on the units while refusing those youngsters who, being more disabled, cause problems on the wards and for DMHDD employees.

25. Defendant deVito and DMHDD are mandated to provide treatment (*Ill. Rev. Stat.* Ch. 91 1/2, § 1-8 (1977), Section 2-102 of the 1979 Mental Health Code) for patients in mental health and developmental disabilities programs. These programs include hospitalization (Section 1-9,1-10, 1-11 and 1-111 and 1-112 of the 1979 Mental Health Code) or may include other than hospital mental

health programs. (See 1-10 and 100-7.1 of the Mental Health Code and 1-113 and 1-114 of the 1979 Mental Health Code) Where Defendant deVito and DMHDD do not have such programs available for mentally disabled children they are mandated by law to purchase the care for these children. (100-7.1 of the Mental health Code). Moreover, if a child is deemed appropriate for release by the State either absolutely or conditionally from hospitalization, the superintendent of the hospital shall not release the person unless the child is able to live independently in the community or unless DMHDD makes arrangements for further oversight and supervisory care with responsible relatives or others. (100-15 of the Mental Health Code).

26. Despite these provisions and Defendant deVito's mandated duty to care for mentally disabled children, he and his employees and agents have chosen to disregard such mandate and to selectively discriminate against mentally disabled children who act out in such a way allegedly to disrupt mental health programs, whose mental disablement is not so severe as to require hospitalization but who require ongoing institutional care or whose mental impairment is such so as to require long term or secure therapeutic institutionalization.

27. Defendant Coler and his employees and agents, and predecessors are mandated by Illinois law to provide "direct child welfare services when not available through other public or private child-care or programmed facilities." (*Ill. Rev. Stat.* Ch. 23, Sec. 5005 Par. 1).

28. In defining just what child welfare services DCFS is to provide, Section 5005 substantially reflects 42 USC 625.

> "The term 'child welfare services' means public social services which supplement or substitute for parental care and supervision for the purpose of; (1) preventing or remedying or assisting in the solution of problems which may result in the neglect, abuse or exploitation of children; (2) protecting and caring for homeless, dependent or neglected children; (3) protecting and promoting the welfare of children including the strengthening of their own families and counseling of family members; (4) providing adequate care of children away from their homes, where needed, in foster family homes or day care or other child care facilities; or (5) providing counseling for mentally retarded, physically, and socially handicapped children and their parents when not otherwise available." (*Ill. Rev. Stat.* Ch. 23 Sec. 5005 Par. 3)."

29. Defendant Coler, his employees, and agents must provide services for wards of DCFS as well as for individuals within the state who require child welfare services and where such services are not available through other public or private child care program or program facilities. Either Defendant deVito must provide such services or Defendant Coler must provide them. At the present time, families and children find themselves in the position of being referred by Defendant deVito, his employees and agents to Defendant Coler, his employees and agents when they require assistance. But when they seek assistance of Coler, his employees and agents, they

are referred back to Defendant deVito. There are no reasonable expeditious administrative remedies to rectify this discrimination.

30. Defendant Coler, his agents and predecessors, do not provide the programs and facilities themselves for youngsters who require institutionalization and/or a therapuetic structured atmosphere. Traditionally DCFS has relied upon private child care agencies for such placements. DCFS refers their wards, such as the Plaintiffs herein to the agencies for placement and then pays the agencies for caring for the youths. However, there are many more youngsters requiring placement then there are placements available, thus creating a situation where agencies will accept "more desirable" children who are less disturbed and who will create less problems for the staffs. The unfortunate result is that children, such as the Plaintiffs herein, who need held [sic] the most get the least assistance.

31. Each of the State agencies involved herein, DCFS, DMHDD and IOE, receive substantial amounts of Federal funds.

RIGHTS VIOLATED

32. The actions of the Defendants violate the rights of the Plaintiffs and members of their class inasmuch as the Plaintiffs, though otherwise qualified, are mentally disabled, emotionally disturbed and mentally retarded individuals and the Defendants are discriminating against them because of their disablement in direct violation of 29 USC 794 (Sec. 504 of the Rehabilitation Act of 1973) which prohibits any agency or program which

receives federal financial assistance from operating with discrimination on the basis of handicap against any individual.

33. The actions of the Defendants are in direct violation of 42 USC 622 and 625. The rights of the Plaintiffs are protected by these subdivisions insofar as these mandate that programs receiving Federal financial aid for needy children, must provide child welfare services as outlined in Section 625. Such provisions mandate that the services must prevent or remedy or assist in the solution of problems which may result in the neglect, abuse, exploitation or delinquency of children, as well as in the protecting and caring for homeless, dependent and neglected children. The Plaintiffs and the class of disabled youngsters they represent are in grave danger of being exploited and delinquent. The Plaintiffs are homeless and dependent with no family to care for them. The fact that they have no family to care for them is a result of their emotional and mental impairments.

34. The rights of the Plaintiffs to the equal protection and due process of the laws have been violated by the Defendants inasmuch as the Plaintiffs have been denied services to which they are entitled because of their emotional disturbance, mental impairment and retardation.

35. Defendant Coler and his employees violate provisions of Section 504 of the Rehabilitation Act by discriminating against disabled wards such as Richard D., James S., Christine B. and Germaine M. in not assuring that these youngsters attended school regularly.

VI

RELIEF REQUESTED

36. Plaintiffs respectfully ask that this Court enter such orders as are necessary, either to have the Defendants correct their discriminatory behavior toward the Plaintiffs and members of the Plaintiffs' class or, in the alternative, order Director Califano immediately to cease all Federal payments to Defendants, their agents and employees.

COUNT II

1. The Plaintiffs reallege Paragraphs 1 through 40 of Count 1 of the Complaint.

2. Plaintiffs Christine B. and Germain [sic] M. on behalf of themselves and a class of female children similarly situated asks that this Court enter a Judgment declaring that the actions of Defendants deVito, in not having any long-term, secure psychiatric, therapeutic services for juvenile girls violates their equal protection rights as protected by the Fourteenth Amendment to the United States Constitution.

3. Plaintiffs Christine B., and Germaine M. asks that this Court enter any further interlocutory or declaratory

orders that are necessary to obviate this Constitutional violation.

Respectfully submitted,

/s/ Patrick T. Murphy
Patrick T. Murphy

Patrick T. Murphy
Advocate of Juvenile Court
33 N. LaSalle – Suite 2300
Chicago, IL 60602
(312) 782-4530

APPENDIX F

DAVID B., JAMES S., RICHARD D., CHRISTINE B. GERMAINE M., Through their Guardian Ad Litem, Patrick T. Murphy, on behalf of themselves and a class of individuals too numerous and transitory to mention, and IRENE NELSON, PEGGY RODGERS, CAROL ZIENTEK, Probation Officers and Advocates of the Juvenile Court of Cook County, Plaintiffs, v. DR. ROBERT deVITO, Director of the Illinois Department of Mental Health and Developmental Disabilities, RICHARD S. LAYMON, Guardianship Administrator of the Illinois Department of Children and Family Services, JOSEPH CRONIN, Superintendent, Illinois Office of Education, JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare, and GREGORY COLER, Director of the Illinois Department of Children and Family Services, Defendants.

No. 79 C 1662

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Slip Opinion

September 4, 1980

COUNSEL: Patrick T. Murphy, 33 N. LaSalle Street, Suite 2300, Chicago, Illinois 60602 For Plaintiffs.

Alan E. Grischke, Richard L. Ryan, Maureen Mudron, Fern M. Wimberly, William J. Scott, Attorney General, 160 N. LaSalle Street, Chicago, Illinois 60601

Thomas P. Sullivan, United States Attorney, 219 S. Dearborn, Chicago, Ill. 60604 For Defendants.

OPINION BY: CROWLEY

OPINION: MEMORANDUM OPINION AND ORDER
John Powers Crowley, District Judge

This class action was brought under the Civil Rights Act of 1871, *42 U.S.C. § 1983*, and the Rehabilitation Act of 1973, *29 U.S.C. § 794*.[1] Jurisdiction is invoked under *28 U.S.C. §§ 1331* and 1343.

Plaintiffs are actual or potential wards of the Juvenile Court of Cook County who suffer from emotional, physical or mental disabilities. In addition, the action is brought by three probation officers of the Juvenile Court who work as liaisons between the court's advocacy services and the Illinois Department of Mental Health and Developmental Disabilities (DMHDD) and the Illinois Department of Children and Family Services (DCFS).

Defendants are Robert deVito, Director of the DMHDD; Gregory Coler, Director of the DCFS; Joseph Cronin, the Superintendent of the Illinois Office of Education (IOE); and Patricia Harris, the Secretary of the United States Department of Health and Human Services (HHS).[2]

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[1] The Second Amended complaint also charges violations of certain provisions of the Social Security Act, 42 *U.S.C.* §§ 622 and 625. Plaintiffs, however, fail to pursue that claim on this motion, and it appears that they intend to proceed with their claims under 42 *U.S.C. § 1983* and *29 U.S.C. § 794* only.

[2] The Second Amended Complaint names as a defendant Joseph Califano, the Secretary of the Department of Health, Education and Welfare (HEW), Patricia Harris has replaced Joseph Califano as Secretary, and HHS has replaced HEW as the federal agency involved here. Under Fed. R. Civ. P. 25(d) substitution of these parties is automatic.

Currently before the Court are motions to dismiss the complaint by each of these defendants, deVito's motion to strike or to compel pleading in conformance with the rules and deVito's motion to strike certain portions of Harris' motion to dismiss.

The essential allegations of the complaint are that plaintiffs are denied services provided by the defendants' agencies because of their handicap and that each of the agencies receives federal financial assistance.

A myriad of defenses have been raised by the motions to dismiss. A discussion of some of them has been obviated by the filing of the Second Amended Complaint. We now address those that remain.

Defendants argue that plaintiffs failed to properly invoke jurisdiction under *28 U.S.C. § 1331* because the complaint fails to allege the requisite amount in controversy.

To establish jurisdiction under *28 U.S.C. § 1331*, the amount in controversy must be alleged in good faith or otherwise apparent. *Giancana v. Johnson, 335 F. 2d 366 (7th Cir. 1964)*, cert. denied. *379 U.S. 1001 (1965)*. Where plaintiffs seek declaratory and injunctive relief, "the amount in controversy is the value of the right to be protected or the extent or the injury to be prevented." *United States v. City*

Both the original and amended complaint join Richard Laymon, the former Guardianship Administrator of the DCFS, as a defendant. However, he is not named in the caption or in the body of the Second Amended Complaint. Thus, it is unclear whether plaintiffs intend to proceed against his succesor or his estate.

of Chicago, 549 F. 2d 415, 424 (7th Cir.), cert. denied, 434 *U.S. 875 (1977).*

In this action, plaintiffs seek access to services including treatment, care and residential placement which will assist them in overcoming their mental and emotional disabilities. Additionally, they assert their right to be free from discrimination based on their handicap.

The injury resulting from these deprivations is allegedly further deterioration of their mental or emotional condition, inability to find shelter and receive an education. These injuries cannot be found, to a legal certainty, to fall below $10,000. *Brown v. Board of Education, 386 F. Supp. 110, 122 (N.D. Ill. 1974.)*

Defendants contend that the complaint does not state a claim for violation of *42 U.S.C. § 1982* because plaintiffs have not alleged state action or asserted a right, privilege or immunity under the Constitution or laws of the United States.

These contentions are frivolous. The action is brought against each defendant in his official capacity only. All of the allegations concern conduct of defendants as functionaries of the state. Thus, their acts, as agents of the State, allegedly cause the deprivation of plaintiffs' rights.

The complaint alleges violations of equal protection and due process. Those rights are guaranteed by the Fourteenth Amendment.

According to the defendants, the complaint fails to state a claim for violation of the equal protection clause. The argument is premised on defendant's conclusion that

the rational basis test is the appropriate standard to evaluate the constitutionality of defendants activities.

The Court is not persuaded, at this stage of the litigation, that only minimum scrutiny should be applied here, for some of the claims involve more than mere dissatisfaction with Illinois social welfare programs. *See Dandridge v. Williams, 397 U.S. 471 (1970).*

All of the plaintiffs have been charged with minor delinquent offenses in the Juvenile Court. Although it is not clear from this record, it appears that, in some cases, these charges result in confinement in punitive institutions, and a loss of liberty.

In addition, the complaint charges that the DMHDD provides certain programs for boys while failing to provide them for girls. Somewhat greater scrutiny in [sic] applied to classifications made on the basis of sex. *Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).*

However, even if minimum scrutiny was found to be appropriate, defendants' argument must fail. That level of scrutiny requires a determination that the classification bears a rational relation to the purpose of the legislative scheme. No purpose has been articulated by any of the defendants.

The defendants concede, as they must, that a private right of action exists for violation of the Rehabilitation Act of 1973. *See 29 U.S.C. § 794a. N.A.A.C.P. v. Medical Center, Inc., 599 F. 2d 1247 (3d Cir. 1979); Lloyd v. Regional Transportation Authority, 548 F. 2d 1277 (7th Cir. 1977).*

Nevertheless, various arguments are propounded in support of the contention that the Act does not contemplate relief for these plaintiffs.

Section 794 provides in pertinent part:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

Defendant Coler argues, first, that plaintiffs do not allege sufficient facts to establish that they are "handicapped individuals." Secondly, Coler, joined by deVito, argues that plaintiffs are not "otherwise qualified" to receive the services provided by DMHDD or DCFS. Thirdly, these defendants assert that the complaint fails to show that plaintiffs are excluded from services because of their handicap. Finally, defendant Cronin contends that the Act and its accompanying regulations do not impose any duty directly on him to make affirmative efforts to educate or find placement for plaintiffs.

The complaint alleges that each plaintiff suffers some degree of mental retardation or emotional disability requiring psychiatric or psychological care and treatment. In addition, it is alleged that these disorders require placement in some facility which can provide services in order to prevent further mental or emotional retardation.

Section 706(7)(B)(i) defines a handicapped individual as any person who "has a physical or mental impairment which substantially limits one or more of such person's

major life activities." Included in the category of "mental impairment" are "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 C.F.R. § 84.3(i) (1979). The allegations of the complaint clearly place plaintiffs within that definition.

By arguing that plaintiffs are not otherwise qualified to receive services defendants overlook the essence of the complaint. Plaintiffs aver that although DMHDD normally provides care for children with mental and emotional disabilities, it refuses to offer care and treatment and to find placement for these plaintiffs.

Similarly, the DCFS, the agency which assumes responsibility over physically abused, neglected or orphaned youngsters who cannot reside at home, is allegedly derelict in its duty toward plaintiffs. According to the complaint some of the plaintiffs have been physically abused; none of them can reside at home. Although the DCFS would normally find placement for youngsters experiencing equivalent familial problems, it does not find shelter for plaintiffs because they have been charged with minor delinquent offenses and are viewed as disruptive to facilities providing shelter. These allegations are sufficient to establish that plaintiffs are among a category of persons who normally qualify for the services offered by the DMHDD and the DCFS.

Defendants also assert that the allegations do not demonstrate that plaintiffs have been excluded from services because of their handicap. In so doing, they argue that not all handicapped persons have a right to receive services and that the Act only envisions remedies for

deprivations of rights of handicapped individuals vis-a-vis non-handicapped persons.

Plaintiffs, however, do not assert that all handicapped persons have a right to receive services. Rather, they claim that they are deprived existing services and that, whereas those services are provided for persons with similar mental or emotional disabilities, they are not provided to plaintiffs.

The Act outlaws this type of selective enforcement. A recipient of federal financial assistance may not "[provide] different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits or services that are as effective as those provided to others." 45 C.F.R. § 84.4(b)(iv) (1979). See also 45 C.F.R. §§ 84.4(b)(i), (ii), (iii) and 84.52(a) (1979).

Cronin's argument that he owes no direct duty to plaintiffs is refuted by the regulations. The state education agency is charged with the responsibility of overseeing the education of handicapped children. 45 C.F.R. § 121a.600 (1979). The purpose of this delegation of duties is "to assure a single line of responsibility with regard to the education of handicapped children." 45 C.F.R. § 121a.600, Comment (1979). Therefore, regardless of whether or not plaintiffs have joined the Local Educational Agencies, the complaint states a claim against Cronon.

Defendants Cronin and Coler contend that the three Juvenile Court probation officers do not have standing. That contention is well-founded.

The complaint does not allege any injury suffered by these plaintiffs. Moreover, there are no averments that the rights of the adult plaintiffs are so inextricably bound with those of the minor plaintiffs, that they may pursue the claims on children's behalf. *See Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925).* Accordingly, the motions to dismiss as to plaintiffs Nelson, Rogers and Zientek are granted.

Relying on *Lloyds v. Regional Transportation Authority, 548 F. 2d 1277 (7th Cir. 1977),* defendants argue that plaintiffs should be required to exhaust their administrative remedy. In addition to the fact that this action also asserts equal protection violations which are not an appropriate subject for administrative review, other reasons exist for entertaining the action in this Court.

Lloyds was decided before an amendment was added to The Rehabilitation Act explicitly incorporating remedies available under title VI, *42 U.S.C. § 2000d, 29 U.S.C. § 794a.* Courts have long recognized the existence of an implied private right of action under *Title VI, Cannon v. University of Chicago, 441 U.S. 677, 696 and n. 20 (1979),* citing with approval, *Bossier Parish School Board v. Lemon, 370 F. 2d 847 (5th Cir.),* cert. denied, *388 U.S. 911 (1967),* which does not require exhaustion of administrative remedies when, as here, declaratory and injunctive relief is sought. *Cannon v. University of Chicago, 441 U.S. 677, 706 n. 41 (1979); N.A.A.C.P. v. Medical Center, Inc., 599 F. 2d 1247 (3d Cir. 1979).*

The only allegations made against Patricia Harris is in the form of a request that she discontinue federal financial assistance if the practices of the state defendants

persist. Apparently, plaintiff does not object to her motion to dismiss. In any case, the existence of a private right of action against a federal agency to compel termination of funds is questionable. *Cannon v. University of Chicago, 441 U.S. 677 (1979); N.A.A.C.P. v. Medical Center, Inc., 599 F. 2d 1247 (3d Cir. 1979).* Accordingly, Harris' motion to dismiss is granted.

In sum, the motions to dismiss of defendants deVito, Coler and Cronin are denied except as to plaintiffs Nelson, Rogers and Zientek. Defendant deVito's motions to strike or compel pleading in conformance with the rules and to strike certain portions of Harris' motion are moot. Harris' motion to dismiss is granted.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID B., JAMES S. RICHARD D., CHRISTINE B., GERMAINE M., Through their Guardian Ad Litem, PATRICK T. MURPHY, on behalf of themselves and a class of individuals too numerous and transitory to mention, Plaintiffs, vs. DR. IVAN PAVKOVIC, Director of the Illinois Department of Mental Health and Developmental Disabilities, GREGORY COLER, Director of the Illinois Department of Children and Family Services, and DONALD GILL, Superintendent, State Board of Education Defendants.	NO. 79-C-1662 Honorable Marvin E. Aspen

CONSENT DECREE

PREAMBLE

This class action is brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983, and the Rehabilitation Act of 1973, 29 U.S.C. §794. Jurisdiction is invoked under 28 U.S.C. §§1331 and 1343.

Plaintiffs are actual or potential wards of the Juvenile Court of Cook County who suffer from emotional, physical or mental disabilities.

Defendants are Ivan Pavkovic, Director of the Department of Mental Health and Developmental Disabilities; (DMHDD) Gregory Coler, Director of the Department of Children and Family Services; (DCFS) and Donald Gill the Superintendent of the State Board of Education (SBE).

The plaintiffs have claimed that they are denied services provided by the defendants' agencies because of their handicap. Furthermore, plaintiffs claimed that each of the agencies receives federal financial assistance.

The defendants have, unrelated to the course of this litigation, established a program to provide services to plaintiffs, which, plaintiffs have agreed, meets their needs.

By agreement of the parties, this Court has not made any findings of fact or conducted any evidentiary hearings with regard to the merits of plaintiffs' claims.

DEFINITIONS

Terms used in this decree shall be applied consistently with the definitions indicated below:

A. *Ward of the Juvenile Court:* A person so adjudged pursuant to Illinois Revised Statute ch. 37 §704-8 after a finding of the requisite jurisdictional facts, and thus is subject to dispositional powers of Illinois courts pursuant to *Illinois Revised Statutes* ch. 37, §705-1 *et seq.*

B. *Referred to Juvenile Court:* A child who is the subject to intake or *"complaint"* screening as provided under *Illinois Revised Statutes* ch. 37, §703-8 (preliminary conferences) or taken into custody and the subject of an investigation as provided under *Illinois Revised Statutes* ch. 37, §§703-1 and 703-4 without regard to whether a petition for wardship is or could have been filed.

C. *Residential Placement:* Custody or substitute care is away from the home of the child's parents in a facility providing care for children, including but not limited to foster homes, group homes and child care institutions as defined at Illinois Revised Statutes ch. 23, §§2217 *et seq.*

D. *Mental Treatment:* An effort to accomplish an improvement in the mental condition or related behavior of a person, including but not limited to out-patient services, examination, diagnosis, evaluation, care, training, psychotherapy, pharmaceuticals and other mental health services.

E. *Habilitation:* An effort directed toward the alleviation of a developmental disability or toward increasing a developmentally disabled person's level of physical, mental, social or economic functioning, including, but not limited to, diagnosis, evaluation, medical services, residential care, day care, special living arrangements, training, education, sheltered employment, protective services, counseling and other developmental disabilities services.

In order to effect an amicable settlement of the declaratory and injunctive aspects of this action, the parties agree, and this Court having found that the interests of the class will be adequately protected, IT IS HEREBY

ORDERED, that the Defendants Ivan Pavkovic, M.D., Director, DMHDD, Gregory Coler, Director, DCFS and Donald Gill, Superintendent, State Board of Education, their agents, employees and successors in office:

1. Shall apply the provisions of this decree to a class of all children residing or found in Cook County, Illinois who:

A. Are seventeen years of age or less, or, if the person is a ward of the Juvenile Court, twenty years of age or less; and

B. Are referred to Juvenile Court; and

C. Are alleged to have engaged in conduct or whose parents are alleged to have engaged in conduct in violation of the Illinois Juvenile Court Act, *Illinois Revised Statutes* ch. 37, §700 *et seq.;* and

D. Are in need of specialized services including, but not limited to child welfare, mental health and education.

E. Have been denied appropriate services by one or more of the defendants, their agents and employees, after having made the necessary applications for such services.

2. The following mechanism will be used by the parties to resolve any and all difficulties experienced in providing services to the above defined class members:

A. DCFS shall, with the cooperation of DMHDD and SBE, continue to operate a unit in Cook County, Illinois, under the auspices of the Governor's Youth Initiative, (hereinafter "Initiative"), which unit is staffed by representatives from each of the three State agencies. The purpose of the unit is to ensure that this population of

children receive appropriate care and treatment under the least restrictive conditions as may be required in each individual case.

B. Once the appropriate representative of the Juvenile Court refers a case to the Initiative, an initial screening will take place not less than five (5) nor more than nine (9) working days after the receipt of the referral. Emergency staffings may be scheduled at the Initiative Coordinator's discretion.

C. At such review, representatives of DMHDD, DCFS, SBE and the Juvenile Court shall attend.

D. Interim and long term service recommendations will be formulated; a comprehensive service plan is then developed.

E. The Initiative Coordinator will be responsible for fully implementing its goals and objectives.

3. Attorneys' fees for the plaintiffs in the amount of $1500.00 shall be awarded to their attorney and guardian ad litem to be deposited in the Cook County Public Guardian Litigation Fund for Indigents; such money to be used only to meet expenses arising on behalf of indigents. The Cook County Public Guardian shall ex officio be the custodian of the Fund and shall make expenditures therefrom only for the above stated purposes. The Fund shall be a public fund, subject to Chapter 85-902 and Chapter 102-34, *Ill. Rev. Stat.* Reports on the condition of such Fund shall be submitted with the annual report required by Chapter 110½, Sec. 13-5(k) to the Clerk of the Circuit Court. The fees deposited in the Cook County Public Guardian Litigation Fund for Indigents shall be separate

and apart from the fees collected by the Public Guardian in the performance of his statutory duties and shall not be subject to the requirements of Chapter 110½, Sec. 13-3.1 to be paid to the County Treasury.

4. This order constitutes a final judgment with prejudice against all defendants, with regard to all relief claimed by plaintiffs. Jurisdiction of this cause is hereby specifically retained by the Court to enforce the terms of this decree.

Enter: /s/ Marvin E. Aspen
Marvin E. Aspen
United States District Judge

Date: 10/2/81

AGREED:

/s/ Ivan Pavkovic, M.D.
IVAN PAVKOVIC, M.D.,
Director, Department of
Mental Health and Developmental
Disabilities

/s/ Gregory Coler
GREGORY COLER,
Director, Department of
Children and Family Services

/s/ Donald G. Gill
DONALD GILL,
Superintendent, State Board
of Education

/s/ Patrick T. Murphy
PATRICK T. MURPHY
Attorney for Plaintiffs

APPENDIX H

DECLARATION

I, Sheila Nicolai, state under oath:

1. I am a deputy chief probation officer for the Circuit Court of Cook County, Juvenile Justice Division ("juvenile court").

2. I supervise the probation officers assigned to the Advocacy Unit, which consists of seven advocates and one supervisor. I have held this position since 1985.

3. The presiding judge of the Juvenile Justice Division of the Circuit Court of Cook County refers children to the Governor's Youth Services Initiative (GYSI). Prior to making a referral, a judge has determined, after hearing evidence as to the allegations in the delinquency petition and as to the child's background and needs, that committing the child to the Illinois Department of Corrections would be inappropriate.

4. Virtually all of these children exhibit serious emotional or mental problems and are in need of special educational programs.

5. The Advocacy Unit serves as a liaison between the juvenile court and GYSI. The unit investigates the background of the children, prepares a packet of information about them for approval by the presiding judge of the Juvenile Justice Division, provides this information to GYSI, facilitates referrals, reports to the court regarding the status of the children and the referrals, and participates (but does not vote) in all GYSI staffings.

6. At a typical staffing, representatives of the state agencies review the information that we have obtained, interview the child and his or her parents, and review any other relevant documentation.

7. GYSI determines that virtually all of the children referred by the court require residential placements providing treatment and care. GYSI then places them in appropriate facilities. I know of no case where the representative of the Department of Children and Family Services (DCFS) has not concurred in the need for placement and in the selection of the placement.

8. The juvenile court does not designate specific residential care facilities. (The court ordinarily orders that, as a condition of probation, the child cooperate with the placement chosen by GYSI.) The court does not commit the children to DCFS or place them in custody of DCFS. (In one case a child was in DCFS custody prior to the court's referral to GYSI. The court had entered the custody order prior to the filing of the delinquency petition and had based its order on a finding that the child had been abused or neglected.)

9. The spectrum of offenses set forth in the delinquency petitions filed against the GYSI children ranges from nonviolent acts to domestic violence to violent crimes. In only two cases, however, has a child been charged with first degree murder. The court bases its referral to GYSI on the overall unmet needs of the child rather than the specific charges in the delinquency petition.

10. Some of the petitions contain allegations that the children have committed sex offenses against a family

member. In these cases, DCFS informs the families of the children that, if they permit the alleged offender to return to their home, DCFS will remove the other children. The juvenile court has no alternative but to order that the child remain in the juvenile detention center until such time as GYSI can arrange for a residential placement.

11. During the time between the court's referral to GYSI and the child's placement, some of the children are in the custody of the Illinois Department of Corrections for evaluation. A substantial number are in hospitals operated by the Illinois Department of Mental Health and Developmental Disabilities. Others remain in the juvenile detention center. Some are in home confinement, but the vast majority of them cannot remain at home.

12. If GYSI did not place these children, the juvenile court would have no alternative but to commit most of them to the Illinois Department of Corrections, where they would not receive treatment to deal with their emotional and mental problems. In all probability, they would deteriorate.

13. Prior to the court's making a referral to GYSI, the Advocacy Unit must make certain that no other mental health, educational or other services are available to the children. Many of the children have previously been found to meet the eligibility requirements for special education. Often the families of the children have made unsuccessful attempts to obtain the necessary treatment; for them, GYSI is a last resort.

14. Since the entry of the consent decree on October 2, 1981, juvenile court personnel, including the judges of the juvenile court, county probation officers and GYSI

representatives, have worked cooperatively and successfully [sic] to implement the consent decree and to ensure that the children receive the treatment that they need.

15. On July 5, 1995, however, DCFS through its director, Jess McDonald, its general counsel, Cheryl Cesario, and its outside counsel, Christina Tchen, informed the presiding judge of the Juvenile Justice Division of the Circuit Court of Cook County, William J. Hibbler, and myself that DCFS would no longer provide any services to the children referred to GYSI or honor its commitments under the consent decree in the present case. On July 13, 1995, in a meeting with Judge Hibbler and myself, the DCFS general counsel reiterated the statements made on July 5, although DCFS did agree to provide staffing for fourteen children whom the juvenile court had earlier referred to GYSI.

16. Children with serious emotional and behavioral problems who currently have delinquency petitions pending against them in juvenile court continue to need the treatment that GYSI ensures, as the following examples demonstrate.

17. James W. is sixteen years old. In his delinquency petition, the People of the State of Illinois have charged him with gambling and possession of a controlled substance. He has a history of serious psychiatric problems and a current diagnosis of depression, hallucinations and behavioral disorders. He has been psychiatrically hospitalized three times in the last year. Two of the hospitalizations have been in Metro C & A, a DMHDD psychiatric hospital for children and adolescents. When Metro C & A

discharged him after his first placement there, the juvenile court referred him to GYSI because DMHDD refused to provide him with any further treatment, not even an individual care grant. The GYSI representatives from the three defendant agencies unanimously agreed that he needed residential placement, where professionals would manage and treat his serious psychiatric and behavioral problems. GYSI recently referred him to Yellowstone Treatment Center in Billings, Montana, which has accepted him.

18. Nikkitus C. is fourteen years old. The People have charged him with battery. Like James W., he has a history of psychiatric problems, including two psychiatric hospitalizations, one in 1993 and the other in 1995. Mental health care professionals have diagnosed him with conduct disorder, attention deficit/hyperactive disorder and severe personality disorder. He was taken into custody on June 5, 1995. A psychological evaluation in July 1995 recommended that he be placed in a residential facility that could provide intensive therapy and special education. The juvenile court referred him to GYSI on September 22, 1995. The initial GYSI staffing took place on October 16, 1995. He remained incarcerated for almost seven months before GYSI agreed on his need for residential placement and completed the necessary arrangements for his transfer to the Eau Claire Academy in Wisconsin.

19. Terjornie H. is fifteen years old, charged with possession of a controlled substance and two violations of probation for failing to attend school. Between 1991 and 1993, an uncle repeatedly abused him sexually (the uncle is now serving time in prison for these assaults). An adult

male in his neighborhood also sexually exploited him. He was hospitalized in Hartgrove Hospital for almost a month in May 1995 due to his suicidal ideations and his attempts to slit his wrists. Mental health professionals have diagnosed him with depression, post-traumatic stress disorder and retardation. He has a full-scale I.Q. of 61, which places him in the intellectually deficient range. A psychological evaluation at Hartgrove determined that he needs long-term residential placement in order to deal with his multiple traumas, fear of abandonment, feelings of helplessness and numerous behavioral problems. The juvenile court recently referred him to GYSI, which has not yet decided what to do with him. He is obviously in need of long-term structured care. If the consent decree in this case were not in effect, he, like the original plaintiffs, would "fall through the cracks" and not receive the treatment that he desperately needs.

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

/s/ Sheila Nicolai
Date: 5-3-96